

**BEFORE THE MONTGOMERY COUNTY  
BOARD OF APPEALS  
Office of Zoning and Administrative Hearings  
Stella B. Werner Council Office Building  
Rockville, Maryland 20850  
(240) 777-6660**

**IN THE MATTER OF:**  
**T-MOBILE NORTHEAST, LLC**  
**and**  
**JOHN D. AMMERMAN**  
Petitioners

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Board of Appeals Case No. S-2805  
(OZAH No. 11-29)

Michael McGarity

\*

Hillorie Morrison

\*

Oakleigh J. Thorne

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Curtis Jews

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For the Petition

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Sean Hughes, Esquire

\*

Attorney for Petitioners

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Anne Sturm, for the Sugarloaf Citizens Assoc. \*

Neither in support nor opposition \*

\*\*\*\*\*

Emory Barge

\*

Jon Anderson

\*

Opposed to the Petition

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Before: Martin L. Grossman, Hearing Examiner

**HEARING EXAMINER'S REPORT AND RECOMMENDATION**

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## **I. STATEMENT OF THE CASE**

Petition No. S-2805, was filed on September 28, 2010, by T-Mobile Northeast LLC and John D. Ammerman. Petitioners seek the special exception, pursuant to §59-G-2.58 of the Zoning Ordinance, to construct an unmanned wireless telecommunications facility on a 155-foot tall monopole, and an associated equipment area, at 19100 Wasche Road, Dickerson, Maryland, 20854.

The site is on land owned by co-applicant John D. Ammerman ( Tax Account Number 03-00035624). The subject site is in the RDT Zone, which permits telecommunications facilities by special exception. The Montgomery County Transmission Facility Coordinating Group (TFCG), also known as the “Tower Committee,” reviewed the application, and on March 3, 2011, recommended approval of the facility, conditioned upon the applicant obtaining a special exception, which would have required a waiver of setback requirements in the then-proposed location. Exhibit 7.

On April 13, 2011, the Board of Appeals issued a notice that a hearing in this matter would be held before the Office of Zoning and Administrative Hearings on June 24, 2011. Exhibit 12. Technical Staff at the Maryland-National Capital Park and Planning Commission, in a report issued June 17, 2011, recommended denial of the special exception at the then-proposed location based in part on the failure to meet setback requirements (Exhibit 16).

A public hearing was convened as scheduled on June 24, 2011, but the hearing had to be truncated on that date because Petitioner’s counsel announced that Petitioner was seeking to move the proposed location of the cell tower to a location which would meet setback requirements, as reflected in a revised site plan (Exhibit 20). Unfortunately, Petitioner had not done photo simulation or cell coverage studies at the new location; nor had the Transmission Facilities Coordinating Group reviewed the newly proposed location. It was announced at the June 24, 2011 public hearing that the hearing would resume on September 19, 2011. One witness, Emory Barge, a neighbor, testified in opposition to petition at the June 24 hearing. Anne Sturm of the Sugarloaf

Citizens Association appeared at the initial hearing and participated, but elected not to testify at that time. 6/24/11 Tr. 54. She did state that the Sugarloaf Citizens Association is not opposed to a cell tower, but that it had “concerns.” 6/24/11 Tr. 6.

Following the suspension of the June 24 hearing, Petitioners submitted their new plans, photo simulation studies and coverage maps to the TFCG and Technical Staff. On July 7, 2011 the TFCG’s Tower Coordinator recommended approval of the revised plans, conditioned upon the Board of Appeals granting a special exception. Exhibit 23(a). The TFCG adopted this recommendation in a meeting held on July 13, 2011. Exhibit 23. Technical Staff reviewed the resubmission in an amended report, received on September 14, 2011, and recommended approval, with conditions.<sup>1</sup> Exhibit 33.

The hearing resumed, as scheduled, on September 19, 2011, and Petitioners called four witnesses. Petitioners also introduced their final site plan (Exhibits 38(a) and (b)), and other supporting documents. Emory Barge provided additional testimony in opposition, and his friend, Jon Anderson, also testified in opposition. Ms. Sturm did not appear at the resumed hearing, but she did join in an e-mail to Technical Staff (Exhibit 33, Attachment B), along with representatives of four citizen groups and other individuals, noting the improved tower location and suggesting some additional screening.

The record was held open after the hearing, so that Petitioners could file a minor revision to its plans by October 3, 2011, adding trees for screening as requested by the citizens’ groups and recommended by Technical Staff. Technical Staff and interested parties were given until October 13, 2011, to comment on the revised screening plan, and Petitioners were given, at their request, until October 18, 2011, to respond to any comments. 9/19/11 Tr. 159-160.

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<sup>1</sup> The amended Technical Staff report is frequently quoted and paraphrased herein.

The revised screening plan (Exhibit 50) was timely filed on September 30, 2011. No additional comments were received from the public; however, on October 11, 2011, Technical Staff e-mailed the Hearing Examiner with additional recommendations regarding the proposed off-site screening. Exhibit 56. Petitioners agreed to some but not all of Staff's recommendations. Exhibit 58.

When the Hearing Examiner reviewed the file, following the September 19, 2011 hearing, he realized that the attachments to the TFCG recommendations were missing. At the Hearing Examiner's request, the missing attachments (Exhibit 49(a)) were supplied by Bob Hunnicutt, the Tower Coordinator. The Hearing Examiner then informed the parties on September 29, 2011, that the missing attachments would be made a part of the record and invited their comments. Exhibit 49. Since these attachments raised questions regarding the need for the proposed 155-foot height of the cell tower (Tower Coordinator's report of February 3, 2010, p. 3), the Hearing Examiner issued an Order on October 5, 2011, keeping the record open until further notice and establishing procedures to address the issue of whether a tower of the proposed height of 155 feet is needed or whether a smaller tower would suffice. Exhibit 54.

In response thereto, Petitioners argued that the record was sufficient to justify approval of the tower at the height requested, but they also filed propagation maps and an affidavit by their radio frequency engineer, Curtis Jews, asserting that the full height of 155 feet was needed. Exhibits 55, 55(a) and 55(b).

When the opposition witnesses, Emory Barge and Jon Anderson, did not respond to the Hearing Examiner's invitation to review this last issue without a further hearing (*i.e.*, just on written comments), the Hearing Examiner noticed a final hearing date of November 17, 2011, solely to address the tower-height issue. Exhibit 57.

The final hearing convened as scheduled on November 17, 2011. Petitioner called only Mr. Jews. No other witnesses appeared and the record closed, as scheduled, on November 28, 2011.

As will appear more fully below, Petitioners have met all the requirements for the special exception they seek, and the Hearing Examiner recommends that it be granted, with conditions specified in Part V of this report.

## II. FACTUAL BACKGROUND

### A. The Subject Property and the General Neighborhood

As noted above, the address of the subject property is 19100 Wasche Road, Dickerson, Maryland, in the RDT Zone. The special exception site is located on an 10-acre property (Parcel P423) owned by co-Applicant, John D. Ammerman. The property is located on Wasche Road, between Whites Ferry Road and West Hunter Road, west of Poolesville and Beallsville, as shown on the following location map from page 2 of the amended Staff Report (Exhibit 33):

S2805 Location Map



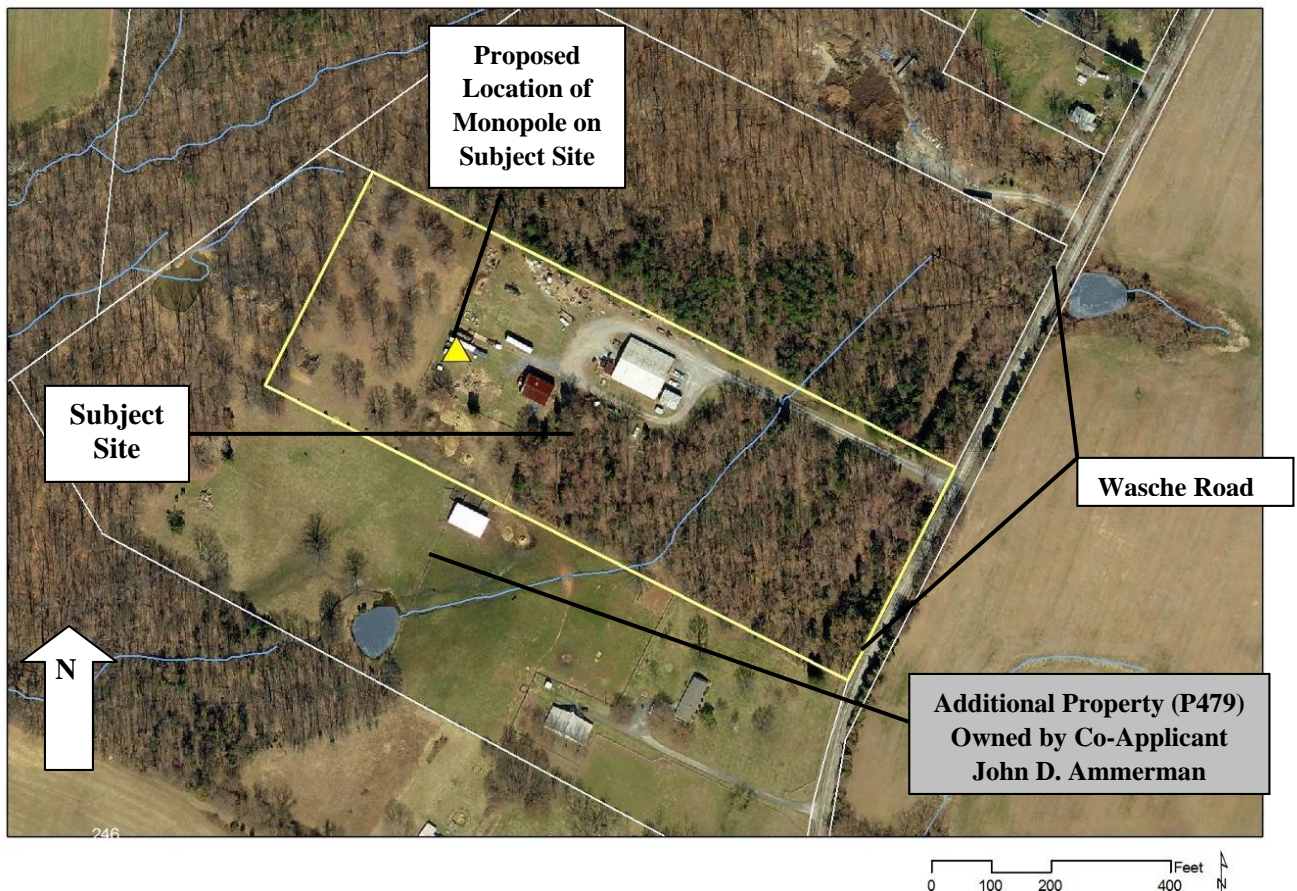


As described by Technical Staff (Exhibit 33, p. 3),

. . . [The property] is “a rectangular parcel, with the long sides along the north and south. Wasche Road, a stream and a forested section are on the eastern end, a gravel area with three metal structures is in the center, and two pastures with scattered trees are on the west end. There are about two acres of stream buffer, 4.5 acres of forest, 2.6 acres of pasture, 1.3 acres of gravel and 4.5 acres of prime farm soils. Three metal buildings are in the center of the site; the main building in the center is quite large.”

Access to the site is over an existing gravel drive extending along the northern part of the site from Wasche Road. The site is well depicted in an aerial photo provided by Staff (Exhibit 33, p. 3):

S2805 Aerial Photo 2010



The property adjacent to the subject site, P479, which is depicted on the above aerial photo, is also owned by co-Applicant John D. Ammerman. It wraps along the south and west sides of the subject site, P423. Technical Staff reports that the pasture on the subject property is part of a small

horse and cattle operation on P479, and miscellaneous equipment and objects are stored outside on the property, including pickup trucks, work trucks, semi-truck cabs, horse trailers, camper caps, trailers with roll-off dumpsters, tractors, boats, travel trailers, wood chippers, log splitters, hoists, barrels, picnic tables, a mobile home and professional-sized grills or smokers. Exhibit 33, pp. 3-5.

The site is located within the Broad Run watershed, and there is a stream with an environmental buffer on the site, running perpendicular to the existing driveway, about 330 feet from the roadway.

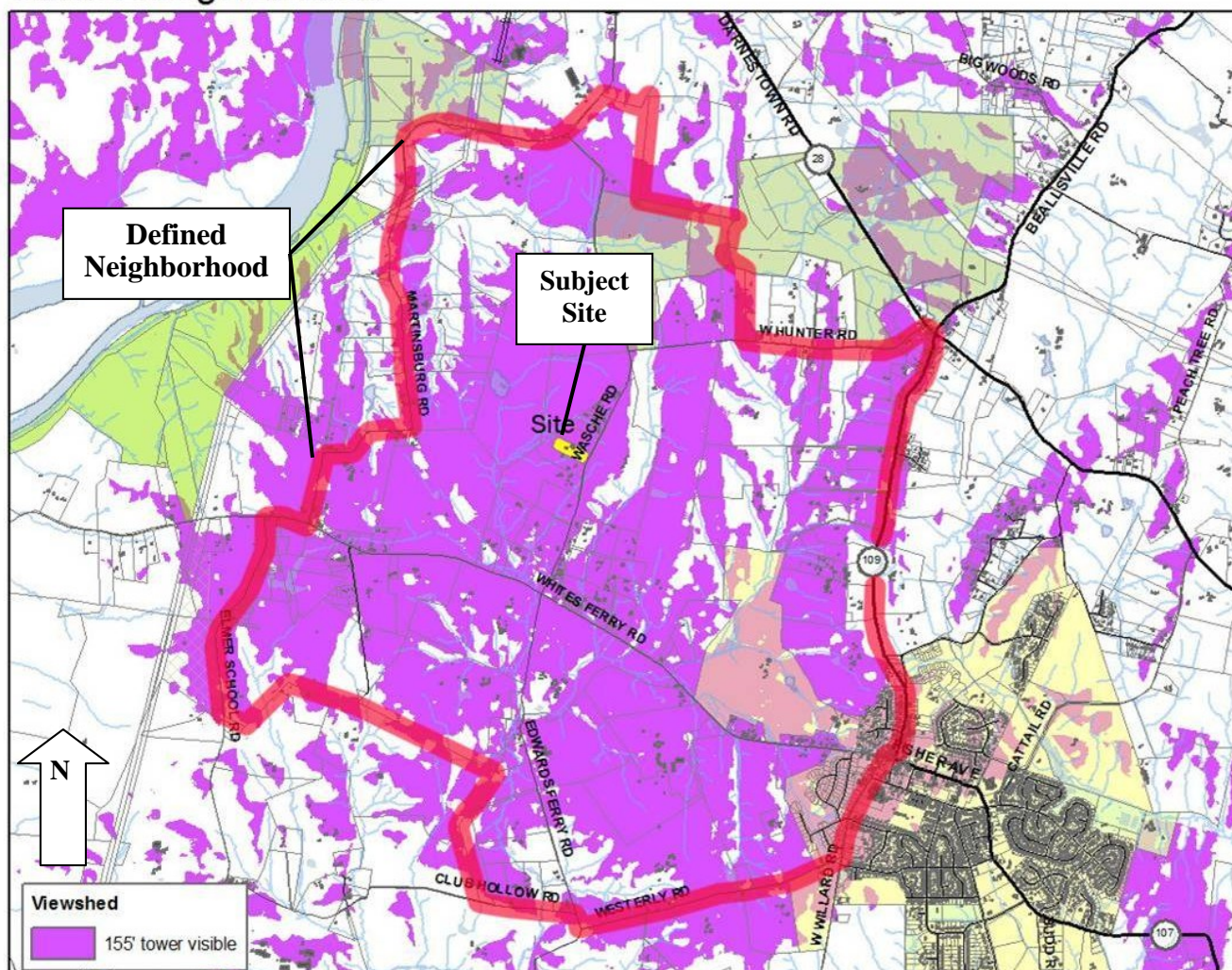
The existing on-site buildings are depicted below in three photos from the Staff report (Ex. 33, p. 4):





Technical Staff proposed to define the neighborhood as bounded on the west and north by Elmer School and Martinsburg Roads, then following property lines to the southeast to West Hunter Road, Darnestown Road (MD 28), Beallsville Road (MD 109), Fisher Avenue and West Willard Road on the east; Westerly and Club Hollow Roads on the south; and following property lines westerly to return to Elmer School Road. Staff reports that this is the area that will experience the greatest visual impact from the tower, according to their “viewshed analysis.” Exhibit 33, p. 5. Petitioners did not dispute this definition of the general neighborhood, and the Hearing Examiner accepts it as well. It is depicted below in a map from the Staff report (Exhibit 33, p. 5):

### S2805 Neighborhood





Technical Staff notes that this area encompasses about 285 properties, of which the largest are farms (about 65 are included). The majority of properties are residential. Staff further describes the neighborhood, all of which is in the RDT Zone, as follows (Exhibit 33, p. 6):

... On the eastern side, a portion of the Town of Poolesville is included. In addition to agricultural and residential uses, there are a small number of retail uses, industrial uses, offices, churches, parkland and a County pool. There are about 20 historic sites, districts or cemeteries within the neighborhood; five sites and one district are named in the Master Plan for Historic Preservation. Nine rustic or exceptional rustic roads are included within the area, including Wasche Road, on which the facility is proposed to be located.

The proposed telecommunications facility is not located on a property identified in the Locational Atlas and Index of Historic Sites in Montgomery County, Maryland or designated in the Master Plan for Historic Preservation. Therefore it is not subject to historic preservation review under section 24A of the County Code. Exhibit 33, pp. 14-15. However, the subject site is located across Wasche Road from Kilmain II (#17/23), located at 19015 Wasche Road, which is a historic site listed in the Locational Atlas and Index of Historic Sites. Technical Staff reports that the proposed tower would be visible from the historic site.

Technical Staff does not report the existence of any other special exceptions in the vicinity of the subject property, but notes that this area is already “burdened with the Mirant power plant, the County’s Resource Recovery Facility (a waste-to-energy plant), the County’s Compost Facility, and vacant County property purchased for a future landfill (this use is no longer proposed, but the County retains ownership of the land).”<sup>2</sup> Exhibit 33, p. 23.

## **B. The Proposed Use**

The proposed use is an unmanned wireless telecommunications facility, with a 155-foot “concealment” monopole. It is called a concealment pole because all the antennas will be concealed

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<sup>2</sup> Opposition witness Emory Barge expressed his concern over the impact of these other uses (6/24/11 Tr. 37-40), and indicated that the County planned to create a landfill on land depicted in Exhibit 35; however, in the sentence quoted above, Staff notes that although the County acquired the land for that purpose, it no longer intends that use.

within the pole itself to reduce the visual impact. It will also be painted gray to blend in with its surroundings. Exhibit 33, p. 15. Access to the proposed tower will be over the existing gravel driveway that runs along the northern part of the site from Wasche Road. The two-page site plan (Exhibits 38(a) and (b)) is reproduced below and on the following pages.



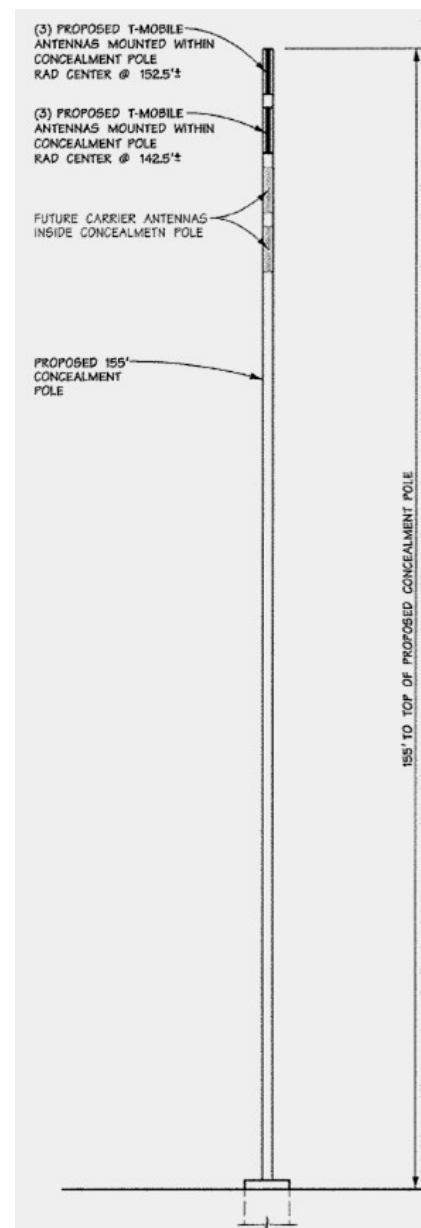
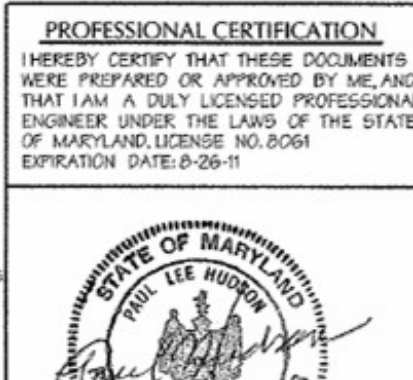
## GENERAL NOTES

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1. Current Owner: John D. Ammerman  
P.O. Box 124  
Dickerson, MD 20842-0124
2. Contract Lessee/Applicant: T-Mobile Northeast LLC  
12050 Baltimore Avenue  
Beltsville, Maryland 20705
3. Site Area: 10.00 acres = 435,600 sq. ft.
4. Existing Use: Residential
5. Site Address: 19100 Wasche Road  
Dickerson, MD 20842
6. Site Data: Tax Map BU51, Parcel P423  
Deed Reference: 8584/130  
Tax Account Number: 00035624  
Election District: 3  
Zone: RDT
7. Proposed Concealment Pole Location:  
Latitude: N 39°10'13.45" (NAD 83)  
Longitude: W 77°27'00.75" (NAD 83)  
Ground Elevation: 390'± AMSL (NAVD 88)  
Proposed Antenna RAD Center Heights: 152.5'± and 142.5'± AGL  
Proposed Concealment Pole Height: 155'± AGL
8. Proposed work includes the installation of (2) T-Mobile equipment cabinets, and a PPC cabinet on a proposed 10'x20' concrete pad at the base of a proposed 155' concealment pole inside a proposed 50'x50' fenced gravel telecommunications compound. A proposed MESA cabinet and an electric meter with circuit breaker are to be installed on a proposed 10' utility backboard inside the compound. A proposed electric transformer protected by bollards is to be installed adjacent to the compound. (6) Proposed T-Mobile antennas are to be mounted inside the proposed concealment pole at centerline heights of 152.5'± and 142.5'± agl.
9. The topographic information shown hereon, in the area of the proposed compound, is taken from a DMW field survey, dated 9-8-10. The topographic information shown hereon, outside the area of the proposed compound, is taken from Montgomery County Digital GIS. Boundary information shown hereon is based upon a deed recorded among the Land Records of Montgomery County MD in Liber 8584 Folio 130. This plan is not the result of a DMW boundary survey and, therefore, is subject to change. This plan may be subject to easements and restrictions that may be recorded or unrecorded and may not be shown hereon.
10. No water or sewer utilities are required for the proposed installation.
11. There are no new signs proposed for this facility unless required by the Federal Communications Commission, the Federal Aviation Administration, or Montgomery County.
12. No tower lights are proposed for this facility, unless required by the Federal Aviation Administration.
13. Existing utility location information shown on these plans is for the contractors convenience only. While the information shown has been gathered from plans and sources deemed to be reliable, the correctness or completeness of the information shown is not warranted or guaranteed. The contractor shall verify all information to his own satisfaction.

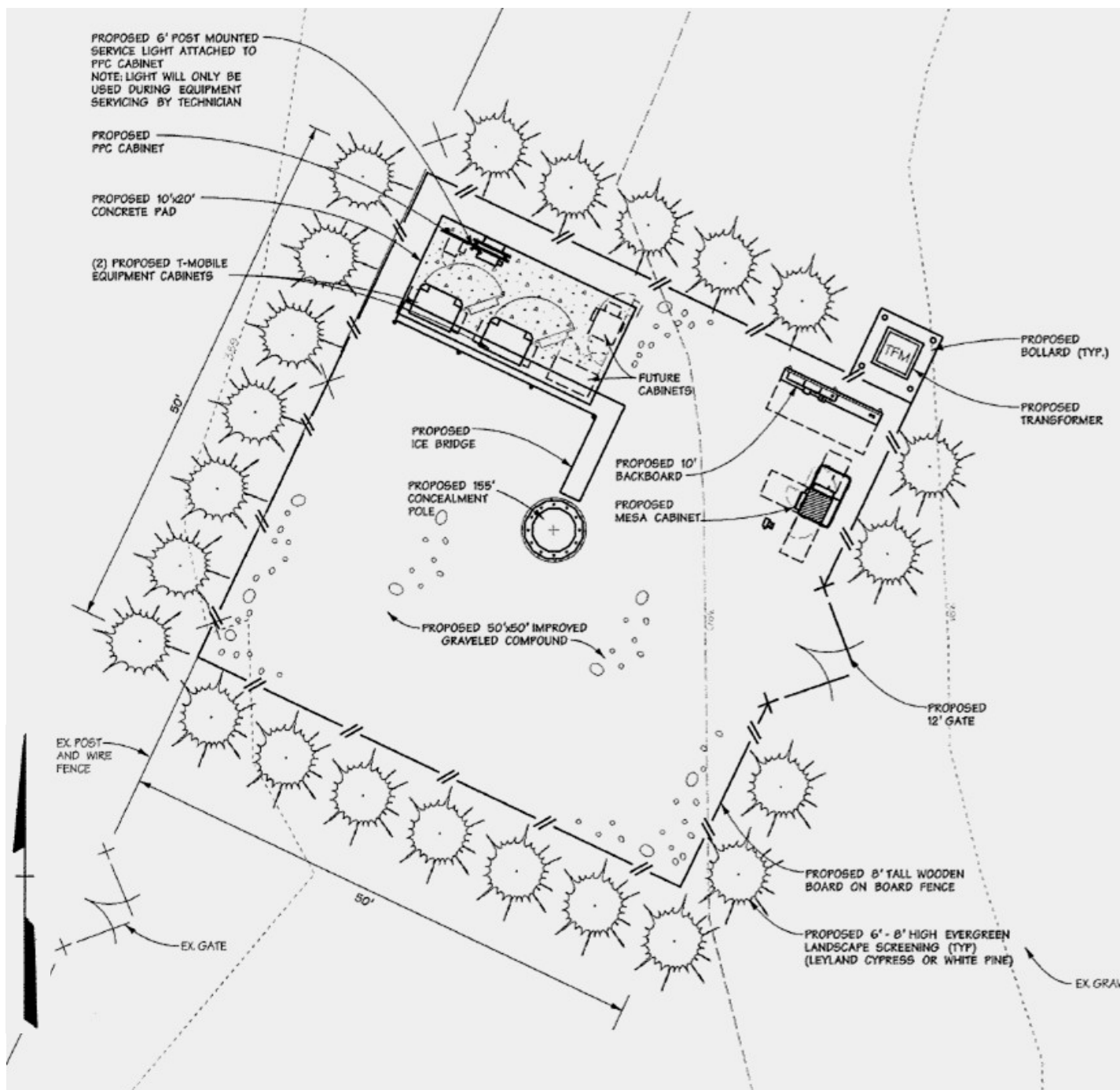


14. The contractor is to notify Miss Utility (800)-257-7777 a minimum of 3 working days prior to any construction or excavation. The contractor is to also notify a private utility contractor for all on-site utility locations.
15. The proposed telecom improvements are not located within a 100 year flood plain as per the National Flood Insurance Program, flood insurance rate map community panel number 24031C0140D revised September 29, 2006.
16. Required number of employees: 0 (unmanned facility)
17. Required number of parking spaces: 0 (unmanned facility; ex. access road)
18. Disturbed area for the proposed T-Mobile equipment: 2,550±s.f.
19. The applicant shall provide a certification from a registered engineer that the structure will meet the applicable design standards for wind loads of the Electronic Industries Association (EIA) for Montgomery County.
20. Zoning information shown hereon is provided by Montgomery County as shown on www.mcmmaps.org.
21. The proposed compound is not within the Chesapeake Bay Critical Area.
22. If the concealment pole is no longer used for telecommunications purposes for a continuous period of one (1) year, it shall be removed by the facility owner at the owner's expense.
23. Concealment pole shall be grey or a similar color that minimizes visibility, unless a different color is required by the FCC or FAA.
24. The concealment pole will be identified by a sign no larger than 2 square feet and fixed to the support structure or equipment shelter. The sign shall identify the owner and maintenance service provider of the support structure or any attached antennas and provide the telephone number of a person to contact regarding the structure. The sign will be updated and the Board of Appeals notified within 10 days of any change in ownership.
25. There will not be any outdoor storage of equipment or other items, except as provided by these plans and approved by the county.
26. The owner of the telecommunications facility shall maintain the telecommunications facility in a safe condition.
27. The property owner has indicated that there is no septic area on the subject parcel. Existing septic is located on the adjacent parcel (parcel P479).



The monopole and related equipment will be contained within a 2,500 square-foot fenced and graveled compound (50 feet by 50 feet). Two radio base station equipment cabinets will be placed on a 10-foot by 20-foot concrete pad within the proposed compound. The proposed equipment cabinets measure approximately 63 inches high, 51 inches wide, and 37 inches deep. Additional cabinets may be added in the future. Exhibit 24(o), p. 1. In fact, the revised site plan ((Exhibit 38(b)) indicates space for additional future cabinets and a PPC (Power Protection Cabinet) on the

concrete pad. Also within the compound, but not on the concrete pad, is a proposed “Mesa” cabinet, which is part of the equipment used by the facility. A transformer is located just outside the compound. The compound will be secured by an 8-foot tall, wooden board-on-board fence and will be screened by 6 to 8-foot tall evergreens. These features can be seen on page 2 of the site plan, below:



The proposed facility will be constructed with sufficient capacity to hold the antennas of at least two other communication carriers (co-locators) in addition to the antennas of T-Mobile.

Exhibit 38(b) , p. 2; Exhibit 24(o), p. 7.

Although the facility will be unmanned, it will be in operation twenty four (24) hours a day, 365 days a year. The facility will generate no more than occasional trips for maintenance purposes, typically less than one visit per month. It will not generate traffic or affect on-street parking, as there is sufficient room to park on site for the occasional visitor. Exhibit 24(o), p. 2. There will be no lighting at all on the facility except a lamp attached to one of the equipment cabinets for a technician to service the equipment in the dark. 9/19/11 Tr. 72-73.

The proposed monopole will not be lighted and will contain no signage except a sign no larger than 2 square feet affixed to the support structure or equipment shelter to identify the owner and maintenance service provider, as required by Zoning Ordinance §59-G-2.58(a)(8). In addition to the fence and proposed evergreen screening, the equipment compound will be screened by mature trees in the area (*See* aerial photo on p. 6 of this report) and the monopole will be set back 847 feet from the nearest public road, 678 feet from the nearest residence and at least 195 feet from the nearest property line to the south. Exhibit 38(a). Pursuant to the recommendation of Technical Staff (Exhibit 33, pp. 1 and 18), additional screening will be placed on the southern edge of additional property owned by co-Applicant John Ammerman, to screen the adjacent Yates property.

Zoning Ordinance §59-G-2.58(a)(2)(A) requires, in a residential or agricultural zone, that the cell tower be set back a distance of 300 feet from the nearest off-site dwelling, which is met by a 678-foot setback in this case. In addition, Zoning Ordinance §59-G-2.58(a)(1)(A) requires, in a residential or agricultural zone, that the cell tower be set back a distance of one foot from the property line for every foot of height of the support structure. Given the height of 155 feet for the cell tower, a 155-foot setback from each property line is required. Although the location of the



tower originally proposed by Applicants would have required a waiver of setback requirements, the current proposal, as depicted in the site plan (Exhibit 38(a)) would not since the setbacks are easily met on all sides: it is 195 feet from the southern property line; 249 feet from the western (rear) property line; 198 feet from the northern property line; and 847 feet from the eastern (front) property line. As a result of these changes, Technical Staff now recommends approval of the cell tower, with conditions (Exhibit 33, p. 1), as does the Hearing Examiner.

The equipment shelters house the electronics for the structure and backup batteries. T-Mobile will use a NorthStar battery or the equivalent (or better). Exhibit 43. Exhibit No. 43(b) is the specifications sheet for NorthStar batteries. Exhibit No. 43(a) is a fact sheet that describes the chemical safety information with regard to the radio base station cabinets used in T-Mobile sites. It states that the EPA classifies NorthStar NSB 100-FT battery as spill-proof. T-Mobile operates a network of over 1,500 radio base stations in the D.C. Metro area. Since 1999, when the network was first launched, T-Mobile has operated and maintained this equipment without a single failure or accident resulting in any chemical release. According to T-Mobile's statement, the chemicals contained in the T-Mobile radio base station cabinets do not pose any threat to the general public or the environment throughout an extreme range of operating conditions. Hillorie Morrison, who acts as T-Mobile's agent for purposes of zoning, testified that T-Mobile commits to registering the batteries with the County as required by Montgomery County law. 9/19/11 Tr. 76 and Exhibit 43.

### **C. Impact of the Proposed Facility on the Neighborhood**

The most significant issue regarding a telecommunications facility in an agricultural zone is its potential visual impact upon the neighbors and the rural vista. This was the concern raised by nearby resident Emory Barge in opposing the cell tower (6/24/11 Tr. 34-53) and by the four community groups and others that e-mailed Technical Staff (Exhibit 33, Attachment B).

Mr. Barge also opposed the facility because it is one more burden on a rural area already

burdened by a variety of other projects (a power company, a police shooting range, “trenching of sludge” for compost and a proposed landfill).<sup>3</sup> 6/24/11 Tr. 37. He is also not convinced the cell tower is needed since he gets reception on his “jitterbug” wireless instrument, although that is apparently powered by Verizon and not T-Mobile. As will be discussed in another section of this report, all of the probative evidence in this case is to the effect that the additional cell tower is needed by T-Mobile to provide adequate in-building coverage in this area.

As to the view of the proposed cell tower, Applicants’ land planner, Hillorie Morrison, testified that T-Mobile does a visual test, using a red balloon (about two feet in diameter) raised to the height of the proposed monopole. Where the balloon is visible, T-Mobile simulates what the actual monopole would look like based on the 155-foot height and the style of the pole. Visibility was examined at various points around the site, and photographs of the site were taken from these points, at the locations designated on the following map (Exhibit 24(a)). 9/19/11 Tr. 65-69.



<sup>3</sup> According to Technical Staff, the landfill is no longer planned for the area; however, Staff confirmed that the Mirant power plant, the County’s Resource Recovery Facility (a waste-to-energy plant) and the County’s Compost Facility do have a negative impact on this area. Exhibit 33, p. 23.

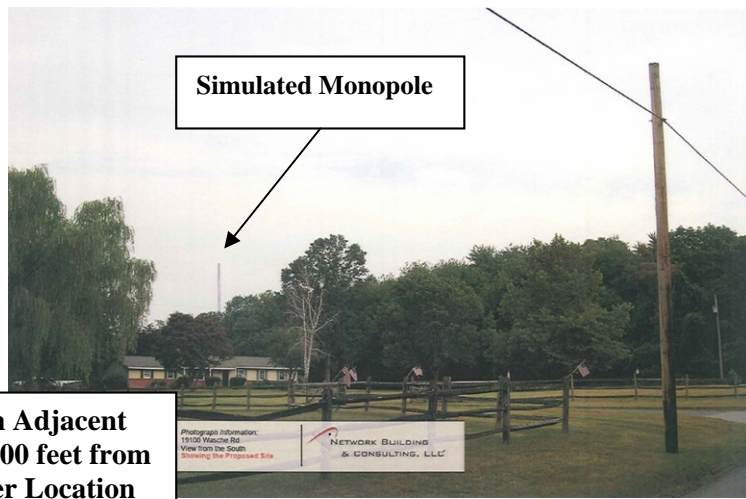
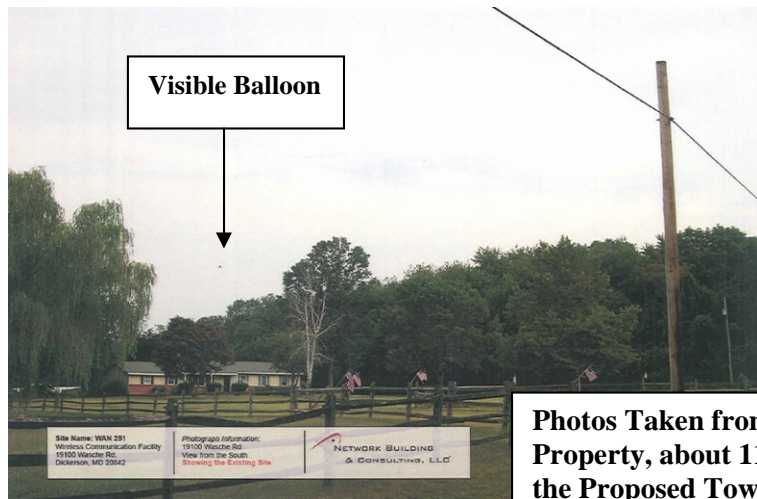
The tag, WAN-251, pertains to this particular transmission tower. The black rectangle marked “Site” shows the proposed location of the monopole based on its coordinates. The various blue and red dots show the points where the pictures were taken, looking towards the site. Blue dots represent locations from which the balloon was not visible, while red dots indicated the balloon was visible. The bottom line of each location caption, in red, shows how far that point is from the proposed tower. The following photographs depict the site as it exists, viewed from the locations indicated on the photographs. The first seven pictures show that the balloon is not visible from those locations. The remaining two photographs on the left depict the site with the visible balloon, while the photos on the right simulate the site as one would see it with the proposed monopole erected.







The next two photographs on the left were taken from locations where the balloon was visible (*i.e.* red dots on the map), and therefore the cell tower would be visible. Thus the photos on the left depict the site with the visible balloon, while the photos on the right include a simulated monopole, thus depicting the site as one would see it with the proposed monopole erected.



**Photos Taken from Adjacent Property, about 1100 feet from the Proposed Tower Location**



These photographs illustrate that the proposed cell tower would not be visible from many vantage points along Wasche Road due to intervening trees, but would be visible from some locations. Technical Staff made the following comments regarding visibility of the proposed monopole (Exhibit 33, pp. 11-12):

One of the most significant negative impacts of telecommunication facilities is their visual impact. In order to protect the rural views along Wasche Road, the applicant proposes a concealment pole; this style is generally preferred by the Rustic Roads Advisory Committee [RRAC] as it reduces impacts on views. For this site, staff concurs. The applicant did not place the facility behind the existing forest, as discussed in the previous report [because the proposed location was moved to meet setback requirements].

Staff finds that the use of the concealment pole helps to protect the “outstanding rural views” from Wasche Road, as recommended by the Rustic Roads Functional Master Plan.

Staff also noted its belief that “the application [will] meet the RRAC’s objective of reduced visibility from the road by moving it from the line of sight of the driveway.” Exhibit 33, p. 16.

In addition, Technical Staff reported (Exhibit 33, p. 17):

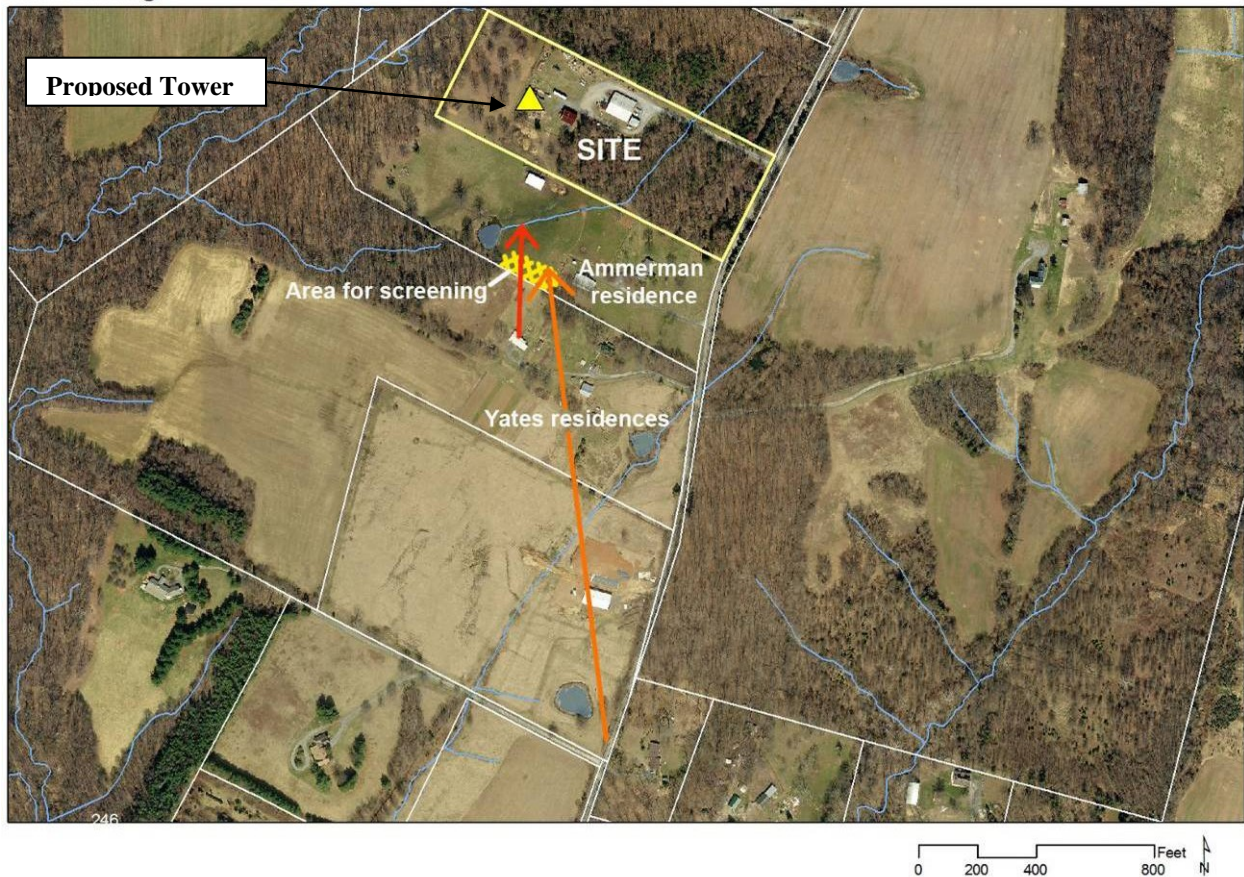
A coalition comprising Montgomery Countryside Alliance, Sugarloaf Citizens’ Association, Audubon Naturalist Society, Sugarloaf Regional Trails, Sierra Club Montgomery and Conservation Montgomery has been active in reviewing the cell tower proposals that T-Mobile has been submitting; T-Mobile’s representatives have been forthcoming in keeping the groups apprised of the changes to their proposals, and sending them balloon test dates in advance.



The coalition's comments . . . on the current application express thanks for the improvements made since the previous submittal, and suggest screening plants at the property line to help mitigate the negative impact to views from Wasche Road and the closest neighbor's house [the Yates property], which will have a direct view of the tower.

Technical Staff supported the request for additional screening, and set out the location it proposed on the following map (Exhibit 33, p.18):

### Screening



Although the recommended location of the additional screening is off-site (Parcel P479), it is still on property owned by the Co-Applicant, John Ammerman. Staff recommended that such screening be planted at the Ammerman/Yates property line rather than on the property line between the two Ammerman properties (*i.e.*, the proposed site and the neighboring parcel just to the south), because planting the screening closer to the location of the viewer would provide more coverage. It

is worthy of note that the community groups which wrote to Technical Staff did not oppose the cell tower, but rather recommended the additional screening discussed above, a recommendation joined by Technical Staff. The Hearing Examiner believes that the additional screening, to which Applicants agreed, is a reasonable step and therefore recommends it.

Because Applicants agreed to this additional screening, the record was left open after the hearing so that they could file a submission showing the additional screening. They did so on September 30, 2011, and it consisted of a letter dated September 22, 2011 (Exhibit 50), from Co-Applicant John Ammerman and T-Mobile's real estate manager, William O'Brien, certifying that they will plant six Leyland cypress trees at the property boundary between Mr. Ammerman's property on Parcel 479 (tax map BU51) and the Yates property, as depicted in the aerial photo on page 18 of the Staff report (Exhibit 33). That aerial photo showing the location of the additional screening is reproduced on page 20 of this report, above.

On October 11, 2011, Technical Staff e-mailed the Hearing Examiner (Exhibit 56), recommending that, given the soil conditions, the off-site screening should consist of specified native species (Virginia red cedar, American holly, river birch and bald cypress), rather than Leyland cypress trees, and that it be denser than proposed by Applicants. Applicants responded on October 18, 2011, indicating that they are "willing to plant up to six trees, a minimum of six feet tall each at planting, consisting of any of the species recommended by staff in its October 11th e-mail correspondence." Exhibit 58. However, Applicants refuse to increase the density of the proposed off-site screening because: "The Ammerman family considered the enhanced recommendation by staff and concluded that that the density of the buffer recommended by staff would significantly interfere with the use of Parcel 479 as pasture land." Exhibit 58.

Since the issue relates to off-site screening and Applicants' rationale appears to be reasonable, the Hearing Examiner recommends approval of the off-site screening as proposed by

Applicant in a statement and aerial photo attached to their October 18 letter (Exhibit 58(a)), which is reproduced below:

As a condition of granting the special exception for Case S-2805, Applicant agrees to plant a total of 6 (six) trees. The trees will consist of any of the following species: Native evergreens consisting of Virginia red cedar (*Juniperus virginiana*) and/or American holly (*Ilex opaca*), or deciduous trees consisting of river birch (*Betula nigra*) and/or bald cypress (*Taxodium distichum*). Each tree shall be a minimum of six feet tall at planting. Plantings to be provided in the vicinity of the orange oval below which is on Parcel 479 close to its border with the Yates property (BU51 P595).



As mentioned previously, some of Mr. Barge's concerns about the environment were also raised by Technical Staff. The project site is located within the Broad Run watershed, and there are an existing stream and an associated environmental buffer on the site running perpendicular to the existing driveway, approximately 330 feet from the roadway. A forest conservation plan exemption



(42012017E) was confirmed for this site by Technical Staff on August 23, 2011 (Exhibit 28(b)). It was granted because the application is for a modification to an existing developed property that will not require approval of a new subdivision plan, will not result in the clearing of greater than 5,000 square feet of forest, and will not affect any forest in a Stream Valley Buffer.

On the other hand, Staff expressed concern about preservation of soils, an issue which is addressed in the next section of this report. In order to preserve and restore these soils, Staff recommends a condition which would require removal of the concrete and gravel area, as well as the tower structure, by the facility owner at the owner's expense, at the time that the pole is removed, in addition to restoration of the soils. No other harm to the environment, other than the vista issues already discussed, was raised by Staff.

Technical Staff did mention that the neighborhood includes a large number of historic resources and there is an historic site directly across Wasche road from the subject site (Kilmain II #17/23 on the Index of Historic Sites, located at 19015 Wasche Road). The proposed facility would be visible from the historic site, but a portion of the mature forest on the Ammerman property will provide screening for the lower portion of the tower, and as Staff notes, the concealment pole in a neutral color will mitigate any impact on the view. Moreover, the proposed telecommunications facility is not located on an historic site and "[t]herefore it is not subject to historic preservation review under section 24A of the County Code." Exhibit 33, pp. 14-15.

The burden on this rural community of the various facilities mentioned, as well as the impact on the rural vistas, is certainly a concern; however, neither the Hearing Examiner nor the Board of Appeals is authorized to vary the County's policy regarding cell towers, and that policy is established in the Zoning Ordinance. As will be discussed in Part IV of this report, Applicants have met all those statutory criteria. The Hearing Examiner finds that Applicants have taken appropriate measures, consistent with the Zoning Ordinance, to reduce the visual impact of the proposed

monopole, and that it is appropriately located. In addition to the use of a concealment pole to hide the antennas and use of an unobtrusive paint on the pole, Applicants have agreed to employ all the on-site screening recommended by the Technical Staff, and most of the off-site screening.

Technical Staff also found, and the Hearing Examiner agrees, that the proposed facility will have virtually no effect on area traffic. As stated by Staff (Exhibit 33, p. 12):

The proposed installation of an unmanned wireless telecommunication facility will not increase the number of weekday peak period trips generated by the site. Therefore, no Local Area Transportation Review/Policy Area Mobility Review is required. Staff finds that the proposed installation of the telecommunication facility under the subject special exception application will have no adverse effect on area roadway conditions.

Applicants also produced testimony from Oakleigh J. Thorne, a certified general real estate appraiser in the State of Maryland and a member of the Appraisal Institute. According to Mr. Thorne, multiple studies have indicated that the presence of a cell tower does not diminish property values of nearby residences, and in some instances may increase their value. Moreover, a concealment pole such as the one proposed would have even less of an impact. 9/19/11 Tr. 100-105. Mr. Thorne concluded that there would be “absolutely no impact on property prices or values in the region” from the proposed monopole. 9/19/11 Tr. 103. There was no contrary expert evidence in the record.

Finally, T-Mobile asserts in its Statement in Support of this application (Exhibit 24(o), p. 1), that “T-Mobile holds a license issued to it by the Federal Communications Commission (“FCC”) to provide personal communication service (“PCS”) throughout the greater Baltimore-Washington, DC metropolitan areas, including all portions and sections of Montgomery County.” T-Mobile’s lead radio frequency (RF) engineer for the Washington Metropolitan area, Curtis Jews, testified that if this site is approved, T-Mobile commits to complying with FCC standards and guidelines regarding radio frequency emissions, and he introduced a letter to that effect (Exhibit 46). 9/19/11 Tr. 117-118.

The letter also notes that the proposed facility will not interfere with the County's public safety communications system.

The FCC regulates radio frequency exposure issues on a Federal level, and local officials are prohibited from deciding, based on health concerns, that a facility is inappropriate, as long as it complies with FCC regulations. Section 704(B) of the Telecommunications Act of 1996, 47 USC §332(c)(7)(B)(iv), provides, *inter alia*, that

*No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications] Commission's regulations concerning such emissions.*

The Hearing examiner finds, based on the evidence, that the proposed use, though it will be visible from some vantage points, will have no non-inherent adverse effects on the surrounding community that cannot be remedied by appropriate conditions.

#### **D. The Master Plan**

Petitioners' property is located in the area subject to the 1980 Functional Master Plan for the Preservation of Agriculture and Rural Open Space (AROS Master Plan) and the 1996 Rustic Road Functional Master Plan (RRFMP). Neither master plan appears to address telecommunications facilities, as such.

Technical Staff correctly points out that the AROS plan identifies the loss of productive farmland as the critical land use issue of the area. Repeated references to this goal are found throughout the Master Plan, as thoroughly reported in the Staff report (Exhibit 33, pp. 8-9, citing AROS Master Plan pp. i, iv, 8, 24, 25, 27 and 56). The addition of a cell tower is unlikely to result in any significant loss of productive farm land. According to Staff, the prime farm soils on this site are already topped with three buildings and a great deal of gravel. Exhibit 33, pp. 8-11. In order to

preserve and restore these soils, Staff recommends a condition which would require removal of the 10-foot by 20-foot concrete platform and the 50-foot by 50-foot gravel area by the facility owner at the owner's expense, at the time that the pole is removed; restoration of the soils should then be done in consultation with staff at the Montgomery Soil Conservation District. The Hearing Examiner joins in that recommendation in Part V of this report.

The Applicants noted that the facility is sited so as not to interfere with the existing agricultural use of the parcel. "Mr. Ammerman owns adjacent parcels which are also in agricultural use. A goal of landlord is to continue with agricultural use of said parcels and if application is approved it is expected to assist with this goal." Exhibit 24(o), p. 2.

The purpose of Rustic Roads Master Plan is to assure that rustic roads are maintained and treated with special care to preserve their rural quality. RRFMP, p. 35. However, the RRFMP also provides that "The rustic roads designation is not intended to affect the use of adjoining land except in the design of access to subdivision. It is also not intended to prevent needed improvements to adjoining land uses . . ." RRFMP, p. 5.

As pointed out by Technical Staff, the Rustic Road Master Plan describes Wasche Road as having "historic value and outstanding rural views." RRFMP, p. 164. Yet, the most significant features of Wasche Road, side banks and stone walls, are not located on this property. Nevertheless, the Hearing Examiner agrees with Staff that the most significant negative impact of cell towers is their visual impact, and, as previously mentioned, "Staff finds that the use of the concealment pole helps to protect the 'outstanding rural views' from Wasche Road, as recommended by the Rustic Roads Functional Master Plan." Exhibit 33, p. 12. Staff notes that this type of pole is generally preferred by the Rustic Roads Advisory Committee as it reduces impacts on views. Exhibit 33, p. 11.

It must also be observed that Zoning Code §59-C-9.3(f) permits telecommunications

facilities by special exception in the RDT Zone, and neither Master Plan recommends changing the RDT designation for this site.

The Hearing Examiner agrees that the subject proposal will not offend the goals and objectives of either applicable Master Plan. The proposed cell tower will serve an important public purpose, as will be discussed in the next section, and the visual impact of the proposed cell tower will be mitigated by the use of a concealment pole, its distance from Wasche Road and the proximity of numerous trees.

### **E. Need for the Proposed Facility**

#### **1. Background Regarding the Need Issue:**

T-Mobile is proposing to locate a new telecommunications facility in order to fulfill its service requirements in this area. The currently proposed location for the cell tower is the third place on the Ammerman property proposed by T-Mobile. The Montgomery County Transmission Facility Coordinating Group (TFCG) reviewed the initial application (TFCG #200907-10) on February 4, 2010, and recommended approval of the cell tower at the first location, “as conditioned by the Tower Coordinator [Bob Hunnicutt].” Exhibit 49(a). However, the first location would have been within a stream valley buffer on the site, and Technical Staff therefore objected.

The second proposed location was outside stream valley buffer but did not meet setback requirements. The TFCG reviewed the application for the second location (TFCG #201103-07) on the Ammerman site on March 2, 2011, and approved it subject to the Board’s approval of a special exception (which would have had to include setback waivers). Exhibit 7. Attached to the TFCG’s March 3, 2011 recommendation memo is the report of the TFCG’s Tower Coordinator regarding the second location, dated January 28, 2011. The Tower Coordinator expressly referred to the February 2010 record regarding the first proposed location (TFCG #200907-10) to explain his rationale. Unfortunately, when the Applicants filed the TFCG recommendation with the Board of Appeals in



TFCG #201103-07 (the second location review), as they are required to do under Zoning Ordinance §59-G-2.58(a)(11), they failed to attach the materials relating to TFCG #200907-10 (the first location review), which were part of the review of the second location in TFCG #201103-07.

When Technical Staff reviewed the second location, it recommended denial because it did not meet setback requirements, and moving the facility closer to the center of the site would “mitigate impacts to the rustic road, the Maryland Scenic Byway, the historic structures, and the prime farm soils.” Staff Report of June 17, 2011 (Exhibit 16, pp. 1 and 14). At the initial OZAH hearing on June 24, 2011, Applicants proposed to move the location closer to the center of the site to meet all setback requirements, 6/24/11 Tr. 19-27. Because Petitioner had not done photo simulation or cell coverage studies at the new location; nor had the Transmission Facilities Coordinating Group (*i.e.*, the TFCG or Tower Committee) reviewed the newly proposed location, the hearing was adjourned until September 19, 2011. 6/24/11 Tr. 57.

During the hiatus, Applicants did the required studies, and the matter was re-reviewed by the TFCG on July 13, 2011 (TFCG #201103-07 REVISED). Exhibits 23 and 23(a). Once again the TFCG recommended approval, subject to the Board’s granting a special exception; however, once again, the TFCG expressly relied on the record already compiled in its two earlier reviews, and noted Mr. Hunnicutt’s comment that the movement on the site was small enough so that the previous analysis regarding coverage (*i.e.*, need) was unchanged. Exhibit 23. Mr. Hunnicutt’s report to the TFCG of July 8, 2011 also noted that the 2009 and 2011 TFCG records were attachments. Exhibit 23(a). Once again, those attachments were not filed by Applicants.

Following the second hearing on September 19, 2011, the Hearing Examiner reviewed the file and realized that the attachments to the TFCG recommendations were missing. He therefore contacted Bob Hunnicutt, the Tower Coordinator, who forwarded him copies of the missing attachments. The Hearing Examiner then informed the parties on September 29, 2011, that the

missing attachments (Exhibit 49(a)) would be made a part of the record. Exhibit 49. The Hearing Examiner also invited Applicants to comment on the attachments and specifically asked them to respond to the following notation made by Mr. Hunnicutt regarding the proposed height of the cell tower (Tower Coordinator's report of February 3, 2010, p. 3):

Based on the RF maps, we conclude that it may be possible to meet the stated coverage objective with antennas at lower levels than proposed. If that is the case, a shorter monopole could be used, minimizing the visual impact of a new tall structure in this rural area.

Specifically, the Hearing Examiner asked "what evidence there is in this record that the cell tower could not be lower than the 155 feet proposed and still meet T-Mobile's objectives, as suggested by the above-quoted sentence from the Tower Coordinator?"

On October 4, 2011, Applicants responded with a letter (Exhibit 53) arguing 1) that the record was closed; 2) that they met their obligations to file the TFCG report; 3) that the only relevant part of the TFCG report is its recommendation of conditional approval; 4) that, in any event, they had made an adequate showing of need for a 155-foot tall tower; and 5) that relying on the Tower Coordinator's comments without giving them an opportunity to respond with testimony from their radio frequency engineer would be unfair.

On October 5, 2011, the Hearing Examiner issued an Order keeping the record open until further notice and establishing procedures to address the issue of whether a tower of the proposed height of 155 feet is needed or whether a smaller tower would suffice. Exhibit 54. The Order also addressed each point raised by Applicants, as set forth below:

a. Whether the record was closed:

The record was not closed at the end of the hearing on September 19, 2011, but it was kept open for the limited purpose of receiving revised plans for additional screening, which Applicants have filed. 9/19/11 Tr. 159-160. However, that does not mean that the Hearing Examiner cannot

receive additional evidence while the record is open in order to reach a just conclusion to the case. In addition, the Hearing Examiner is authorized to keep the record open for other purposes to serve the interests of justice.

The Montgomery County Administrative Procedures Act, §2A-8(h)(5) specifies that the hearing authority is empowered “*To regulate the course of the hearing and to allow the record in hearings to remain open.*” Moreover, §2A-8(b)(3) provides that “*The hearing authority may seek additional evidence if the evidence is included as part of the record and the parties are given due notice and opportunity to respond.*” That is precisely what the Hearing Examiner has done here. Rule 4.7 of OZAH’s Rules of Procedure also provides, in relevant part: “. . . The Hearing Examiner may reopen the record to receive additional evidence or receive further evaluation of the application by appropriate government agencies.”

The Hearing Examiner notes that without the additional evidence of the missing attachments to the TFCG report, as discussed in the next paragraph, Petitioners’ application is arguably deficient.

b. The adequacy of Applicants’ Filing:

The Hearing Examiner disagrees with Applicants’ contention that the filing of the TFCG report without the attachments specifically referenced therein was an adequate filing by the Applicants. The Tower Coordinator expressly limited his discussion of the coverage/need issues in his second and third reports because they were adequately addressed in his first report, the one which was not attached by Applicants. The Hearing Examiner assumes that the failure to file the attachments by Applicants was inadvertent, not an intentional act by Applicants in an effort to keep the Bob Hunnicutt quote from the Hearing Examiner. Nevertheless, the attachments are a necessary part of the record.

c. Whether the attachments in question are relevant:

Applicants argued that the only relevant part of the TFCG report is its recommendation of

conditional approval. This argument is clearly without foundation since Zoning Ordinance §59-G-2.58(a)(12) specifies:

*The Board must make a separate, independent finding as to need and location of the facility. The applicant must submit evidence sufficient to demonstrate the need for the proposed facility.*

Thus, the Board and the Hearing Examiner must consider not only the “bottom line” recommendation of the TFCG, but all evidence that is relevant to the issues of need and location. It is the Applicants’ obligation to “*submit evidence sufficient to demonstrate the need for the proposed facility.*”

In this case, there is a clearly relevant statement by the Tower Coordinator questioning the need for a tower of the proposed height. Since it is Applicants’ obligation to demonstrate the need, the relevant question is what evidence there is to refute the Tower Coordinator’s suggestion that “it may be possible to meet the stated coverage objective with antennas at lower levels than proposed.”

d. Have Applicants made a sufficient showing of the need for a tower of this particular height:

Applicants contended in their letter of October 4, 2011 (Exhibit 53) that the evidence in the record at that point made an adequate showing of need for a 155-foot tall tower. They pointed to the testimony of their radio frequency engineer (Curtis Jews) regarding the need for an additional facility, but the transcript of his testimony (9/19/11 Tr. 108-127) reveals that he did not address the question of height at the September 19 hearing. He did produce evidence of need (*i.e.*, insufficient current coverage in the area), but not of the need for a tower of the proposed height rather than a smaller one. Applicants’ non-evidentiary answer in their attorney’s letter of October 4, 2011 (Exhibit 53), is not sufficient to resolve this question, and it was not addressed by Applicants at the September 19 hearing.

e. Fairness and an opportunity for Applicants to respond:

Applicants complained that relying on the Tower Coordinator’s comments without giving them an opportunity to respond with testimony from their radio frequency engineer would be unfair.



Since the Hearing Examiner had assumed that Applicants' failure to file the attachments was an inadvertent error, he agreed with Applicants that fairness demanded that they be given the opportunity to produce additional testimony on the need for a 155-foot cell tower, as opposed to a shorter one.

Therefore, the Hearing Examiner's Order of October 5, 2011, gave Applicants the option of an additional hearing date limited to evidence regarding the needed height of the proposed cell tower, if they were agreeable to waiving the running of the FCC "shot clock" for that purpose. Applicants agreed to this offer. Exhibit 55.

The Hearing Examiner also proposed the alternative of receiving evidence by affidavit from Petitioners' radio frequency engineer, Curtis Jews, but only if Messrs. Barge and Anderson (the only two opposition witnesses) agreed to that procedure, because they would not have the opportunity to cross-examine on the issue, though they would of course have been able to submit a written response.

Petitioners did file propagation maps and an affidavit by Mr. Jews, asserting that the full height of 155 feet was needed. Exhibits 55, 55(a) and 55(b). However, the opposition witnesses, Emory Barge and Jon Anderson, did not respond to the Hearing Examiner's invitation to review this last issue without a further hearing, and the Hearing Examiner therefore noticed a final hearing date of November 17, 2011, solely to address the tower-height issue. Exhibit 57. The November 17 hearing proceeded as scheduled.

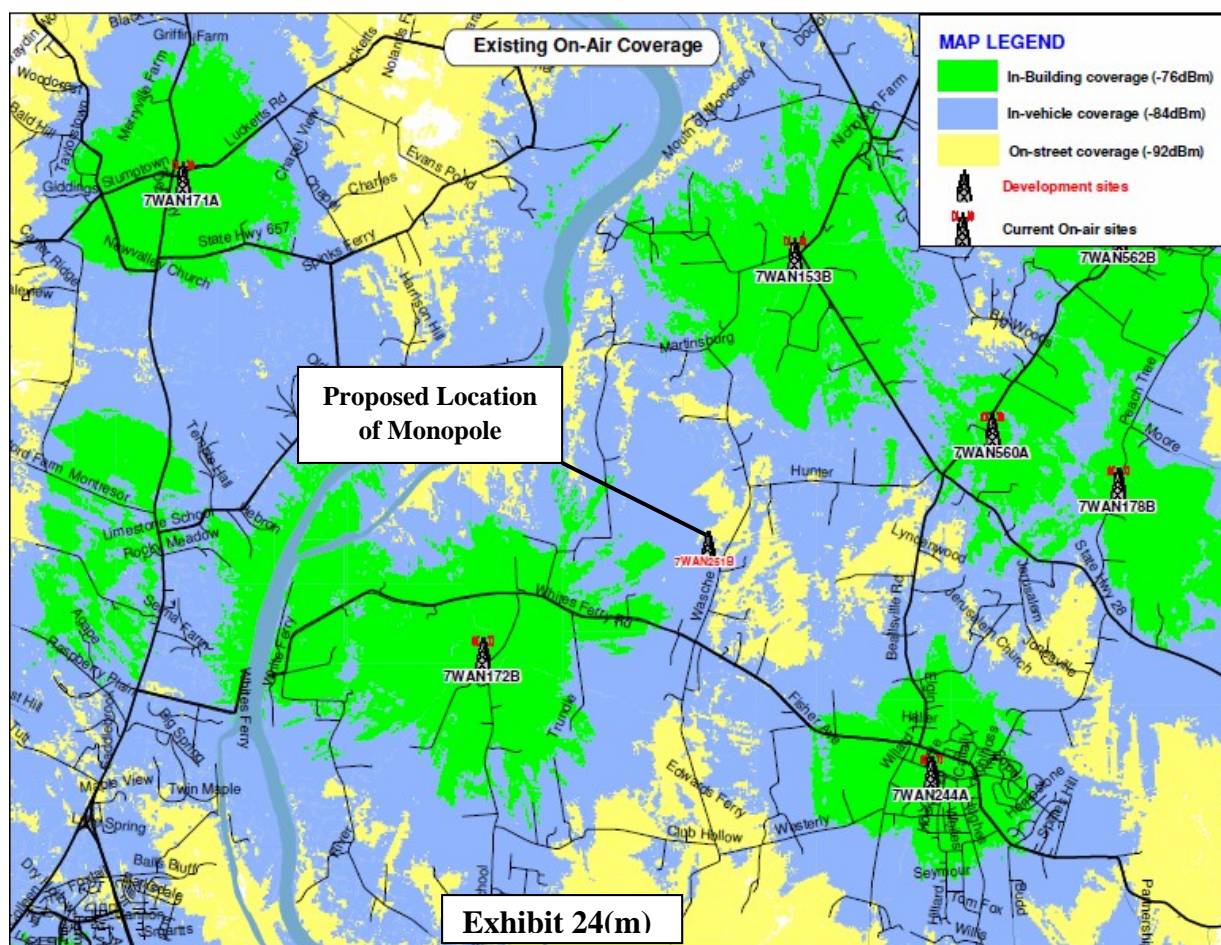
## **2. The Evidence Regarding Need:**

Even though this petition has been recommended by both the Transmission Facilities Coordinating Group (Exhibits 7, 23 and 49) and the Technical Staff (Exhibit 33, p.1), the Board of Appeals "must make a separate, independent finding as to need and location of the facility." Zoning Ordinance §59-G-2.58 (a)(12).

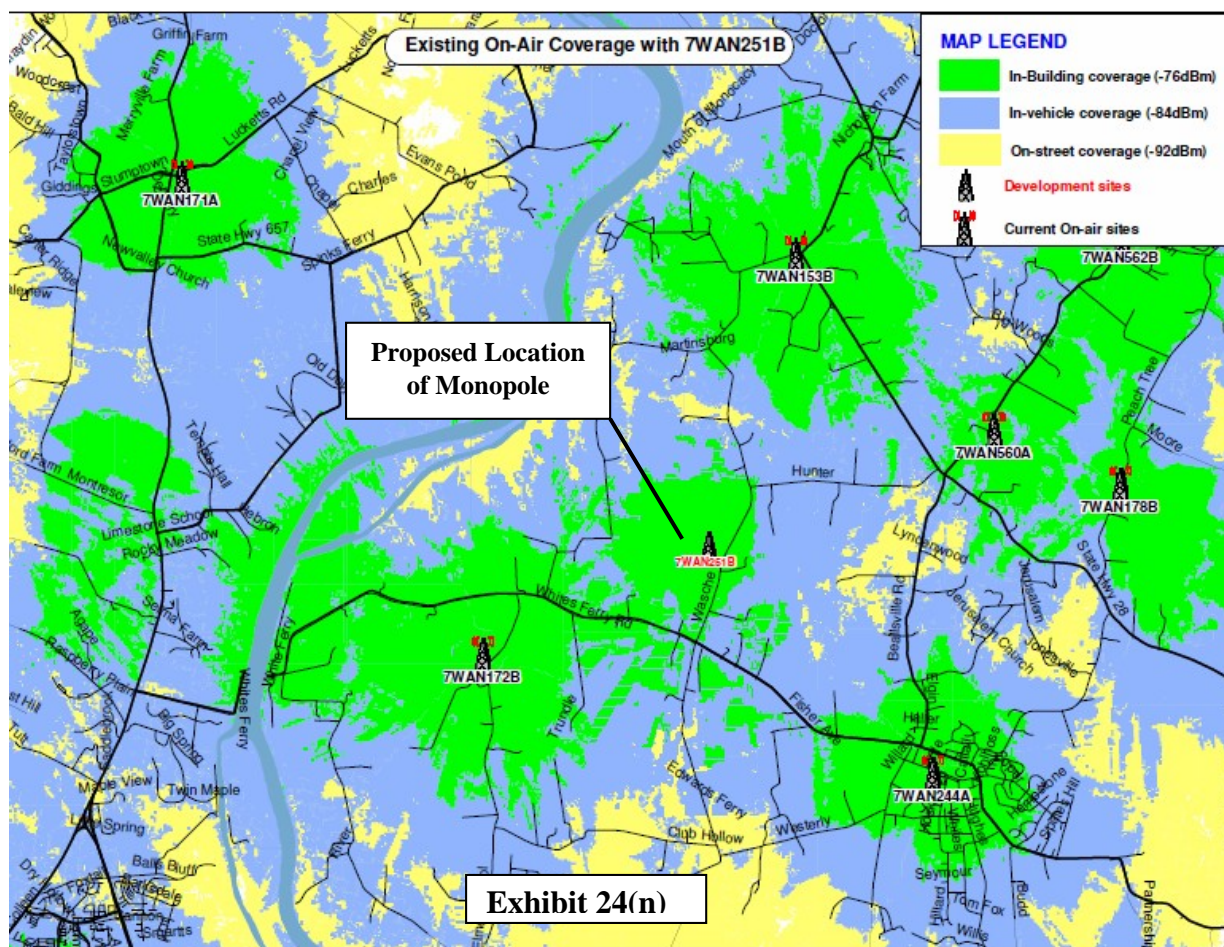
Petitioners presented evidence at the September 19 and November 17 hearings as to both the need for a 155-foot cell tower, and the proper location of the proposed telecommunications facility. That testimony came from T-Mobile's lead radio frequency (RF) engineer, Curtis Jews. 9/19/11 Tr. 107-128, and 11/17/11 Tr. 10-38.

Curtis Jews testified as an expert in Radio Frequency (RF) Engineering. Mr. Jews explained that the subject site is needed for a cell tower because of inadequate in-home coverage, and the need to improve current cell coverage in the area. T-Mobile's coverage goal is to provide better in-building coverage and to add capacity for data usage and additional customers.

At the September 19 hearing, Mr. Jews introduced two coverage maps, Exhibit 24(m) showing current on-air coverage around the site and Exhibit 24(n), showing expected on-air coverage with the proposed site, WAN-251, activated. The current coverage map (Exhibit 24(m)) is reproduced below:



The color green depicts in-building coverage which is the coverage that one can expect inside of the home. Blue is in-vehicle coverage, and the yellow is the on-street coverage. (These show as shades of gray in the hard copy of this report.) As is apparent from Exhibit 24(m), there is currently a lack of in-building coverage in the area of the proposed cell tower – 7 WAN-251B. Exhibit 24(n), depicted below, shows the expected coverage with 7 WAN-251B on air:

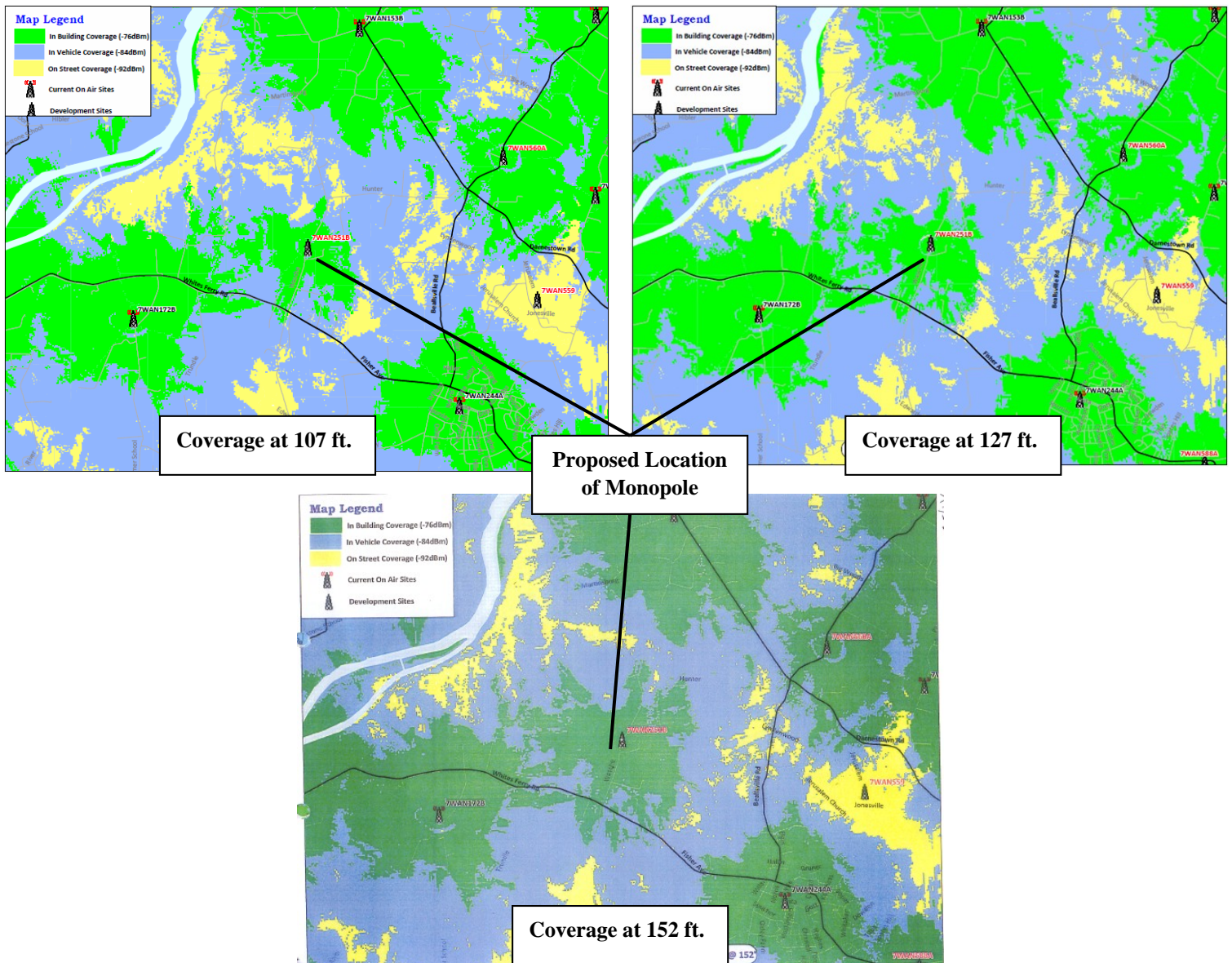


The expanded green area around the proposed cell tower demonstrates the improvement in in-building coverage. There is also an increase in the blue area, showing an expansion of in-vehicle coverage.

As explained in the first part of this discussion of need for the cell tower, a question was raised by the Tower Coordinator as to whether T-Mobile's coverage goals could be met with a



shorter tower than the 155-foot tower currently proposed. Petitioners responded to this question with the affidavit of Mr. Jews (Exhibit 55(a)), additional coverage maps (Exhibits 55(b)(1)-(4)) and Mr. Jews testimony at the November 17 hearing. The coverage maps comparing the antenna heights of 107 feet (Exhibit 55(b)(4)), 127 feet (Exhibit 55(b)(3)) and 152 feet (Exhibit 55(b)(2)) are shown below. It should be noted that a structure height of 155 feet is needed to center an antenna at 152 feet in a concealment pole.<sup>4</sup>



<sup>4</sup> It is difficult to compare these coverage photos with those depicted on pages 33 and 34 of this report because they are in a different scale. However, the coverage maps on this page can be compared with each other.



As shown on these projected coverage maps, the area of in-building (green) coverage clearly expands as the antenna height goes from 107 feet to 127 feet to 152 feet.

At the November 17, 2011 hearing, Mr. Jews testified that T-Mobile needed to improve both its coverage and capacity in the area of the subject site, and that it could lose its FCC license if it did not provide adequate coverage. Mr. Jews adopted the statements in his affidavit (Exhibit 55(a)) and expanded upon them. 11/17/11 Tr. 10-38. Essentially, he testified that inadequate coverage or capacity results in dropped calls and the inability to initiate a call. Building the proposed wireless facility at 155 feet will aid in filling the existing coverage gaps and increasing the customers' confidence when using their devices within this area. A 155-foot height support structure satisfies the coverage objective for this area. In a concealment tower, such as proposed, the top antenna would be centered at 152 feet. In his opinion, for this type of design (*i.e.*, antennas inside the pole), a support structure height of 155 feet is the lowest possible height to meet T-Mobile needs. A support structure of less than 155 feet would provide too little coverage to meet the current and future needs of customers. As shown in the propagation maps (Exhibit 55(b)(3) and (b)(4)), there is a noticeable decrease in in-building coverage if the antenna height were reduced to 127 feet or 107 feet. 11/17/11 Tr. 10-38.

There is no evidence in the record to contradict the testimony of Mr. Jews as to the need for the cell tower, and the Hearing Examiner credits that testimony as being persuasive on this point. Mr. Jews' testimony also adequately responds to the height questions raised by the Tower Coordinator. In the absence of any contradictory testimony, and in light of the comparative coverage maps, the Hearing Examiner accepts Mr. Jews' explanation as to the need for the full 155-foot tall structure. Based on that testimony and on the recommendation of the Transmission Facilities Coordinating Group and the Technical Staff, the Hearing Examiner finds that there is a need for the proposed 155-foot tall telecommunications facility.

### III. SUMMARY OF HEARING

A public hearing was convened as scheduled on June 24, 2011, but the hearing had to be truncated on that date because Petitioner's counsel announced that Petitioner was seeking to move the proposed location of the cell tower to a location which would meet setback requirements, as reflected in a revised site plan (Exhibit 20). Unfortunately, Petitioner had not done photo simulation or cell coverage studies at the new location; nor had the Transmission Facility Coordinating Group (*i.e.*, the TFCG or Tower Committee) reviewed the newly proposed location. 6/24/11 Tr. 19-27. It was therefore announced at the June 24, 2011 public hearing that the hearing would resume on September 19, 2011. 6/24/11 Tr. 57. One witness, Emory Barge, a neighbor, testified in opposition to petition at the June 24 hearing. Anne Sturm of the Sugarloaf Citizens Association appeared at the initial hearing and participated, but elected not to testify at that time. 6/24/11 Tr. 54. She did state that the Sugarloaf Citizens Association is not opposed to a cell tower, but that it had "concerns." 6/24/11 Tr. 6.

At the September 19, 2011 hearing, Petitioners called four witnesses – Michael McGarity, the civil engineer who helped design the plans for the site; Ms. Hillorie Morrison, an expert in land use planning; Curtis Jews, a radio frequency engineer; and Oakleigh J. Thorne, a certified real estate appraiser. Emory Barge provided additional testimony in opposition, and his friend, Jon Anderson, also testified in opposition. Ms. Sturm did not appear at the resumed hearing.

The record was held open until October 18, 2011, so that Petitioners could file a minor revision to the Site Plan, adding trees for screening as recommended by Technical Staff. 9/19/11 Tr. 154-160. It was further held open for a hearing on November 17, 2011, limited to questions concerning the needed height of the tower. At the November 17 hearing, Petitioners called Mr. Jews as a witness. There were no other witnesses, and the record was held open until November 28, 2011, only for receipt of the transcript.

### **A. Petitioner's Case**

#### 1. Michael McGarity (9/19/11 Tr. 30-51; 88-97):

Michael McGarity testified that he is the director of wireless services for Daft, McCune and Walker, an engineering and surveying consultant to T-Mobile. He has been working in the industry for 13 years and has worked on the design of over 1,000 cell tower sites. Mr. McGarity testified as an expert in the civil engineering side of cell-tower site design.

Mr. McGarity stated that T-Mobile is proposing to install a 155-foot high concealment type monopole at Mr. Ammerman's property located at 19100 Wasche Road in Dickerson, Maryland. Concealment monopoles are sometimes called slick sticks or flagless flag poles. It is a pole where the antennas are located on the inside of the structure and are not visible. On a traditional monopole there is generally a triangular type platform mounted to the pole on the exterior of the pole, with the antennas also being mounted on the platform on the exterior. They are visible.

A concealment monopole is essentially a flag pole without the flag and perhaps wider than a traditional flag pole. The property is located in the RDT zoning district. It is 10 acres in size, located off of Wasche Road. The entrance from Wasche Road onto the property is in the northeast corner. Access to the facility would be by an existing gravel driveway back to an existing building used as a repair garage. The site is heavily wooded to the north and to the southeast and west. T-Mobile's proposed location is centered in the property more towards the rear, where the 50 by 50-foot compound is proposed to be installed. The monopole has been recently relocated so that it would meet all the necessary setback requirements for the zone, that being a one-to-one setback (155 feet in this case) from any property line to the tower itself. From the front property line along Wasche Road, there will be a setback of 847 feet. From the north side property line, there will be a setback of 198 feet. From the south side property line there will be a setback of 195 feet. And from the rear property line there will be a setback of 249 feet.

The zoning code also stipulates that the tower must be set back at least 300 feet from any off-site dwellings. In this case, the closest off site dwelling is 678 feet to the southeast, as indicated here on the site plan. Mr. Ammerman owns that property as well.

Mr. McGarity described the property using an aerial photo (Exhibit 37). The property is 435,600 square feet, and the facility compound will be 2,500 square feet. Mr. McGarity introduced Exhibits 38(as) and (b), the revised site plan, certified by a civil engineer. According to Mr. McGarity, easily two additional carriers could be located inside the 50 by 50-foot compound, in addition to the T-Mobile installation. 9/19/11 Tr. 88. A 50 by 50-foot area is fairly standard for a ground compound. T-Mobile can order the tower with any of the specifications they require, where they need to be able to accommodate three carriers, four carriers, five carriers, however many slots are required for the pole. The tower manufacturer will design the pole to meet that requirement. 9/19/11 Tr. 89.

2. Hillorie Morrison (9/19/11 Tr. 52-87):

Hillorie Morrison, works for Network Building and Consulting, and her firm acts as T-Mobile's agent for purposes of zoning. She testified as an expert in land use planning and in telecommunications siting.

Exhibit 41 shows the proposed site, T-Mobile's WAN-251 Ammerman-Dickerson property, and the closest cell sites surrounding it. A red flag marks WAN-251 because it is proposed, and green flags mark the surrounding existing antenna sites. The map also shows the distance to each site.

According to Ms. Morrison, the Montgomery County Tower Committee reviewed this application and recommended approval from the technical standpoint. They recognized that there was a coverage need, and there is no existing structure on which to mount the antennas.

Ms. Morrison stated that the special exception notice sign continues to remain in place on

the site. She stated that she was surprised by Technical Staff's recommendation for additional off-site screening, but Applicants do not object to putting six to eight Leyland cypress trees next to the property line southeast of the tower location, between Mr. Yates' property and Mr. Ammerman's property, abutting the area where the tower will be built, as indicated on page 18 of the September 14, 2011 Technical Staff report. 9/19/11 Tr. 60-61.

Ms. Morrison further testified that when T-Mobile erects a new monopole, it does a visual test, using a balloon (about three feet in diameter in this case) raised to the height of the proposed monopole. Visibility is examined at various points around the site. Where the balloon is visible, T-Mobile simulates what the actual monopole would look like based on the 155-foot height and the style of the pole, as shown in photographs (Exhibits 24(b) – (l). The location map marked “WAN-251” is Exhibit 24(a). WAN-251 pertains to this particular transmission tower. The black square in the center shows the location of the monopole based on its coordinates.

The seven blue dots show the point where pictures were taken looking towards the site, but the balloon could not be seen. The two red dots show the point where pictures were taken looking towards the site, and the balloon could be seen. These photographs depict the site as one would see it from the location that's indicated on the photograph. The site was not visible north on Wasche Road, or mostly south on Wasche Road, west on White's Ferry Road, and east on Hunter's Road. It was visible to the south of the vicinity of the pole. So that would have been from 19100 Wasche Road, and 18815 Wasche Road. According to Ms. Morrison, she found “very minimal visibility” in this case. 9/19/11 Tr. 65-66. In some of the photos telephone poles bearing numerous wires are visible. Ms. Morrison indicated that T-Mobile takes the pictures from public roads, not from private properties, so there are no photos from the farm land to the west.<sup>5</sup> 9/19/11 Tr. 68.

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<sup>5</sup> The Hearing Examiner notes that the property to the west of the site is the area that Mr. Barge testified was acquired by the County for a landfill, depicted on Exhibit 35 in a darker tone.

Ms. Morrison also testified that the proposed tower would not be required to be lit under FAA Notice Criteria (Exhibit 42) because it will not be 200 feet above ground level nor near an airport. There will be no lighting at all on the facility except an emergency light down near the ground, attached to one of the equipment cabinets for a technician to service it in the dark. 9/19/11 Tr. 70-72.

Ms. Morrison opined that the proposed facility will be in compliance with all of the general and specific requirements for the special exception and with the Master Plan. As a concealment pole, it will be in harmony with the surrounding area. Also, it is an unmanned facility which will not generate traffic or parking. Visits to the site are once every two months, just to check to make sure that everything is in order, or possibly if there is a malfunction. There will be no impact on public water or sewer. It doesn't create demand for more classrooms. It's a passive use. In her opinion, it will not be detrimental to the use, peaceful enjoyment, economic value, or development of the surrounding properties. It can enhance property values by bringing better wireless communication, both for voice use and data use. It's difficult to bring hard line out to rural areas like this. So it gives another option for people who live here. It also will not cause any objectionable fumes, vibrations, noise, odors, dust or illumination. There is no generator at the site. There is virtually no noise, no smell, no odor, no interference with other electronic equipment. The site will be served by adequate public services and facilities. 9/19/11 Tr. 73-76.

Ms. Morrison introduced an affidavit of William O'Brien, who is real estate manager for T-Mobile. Exhibit 43. He testifies to a commitment by T-Mobile to register the batteries with the County's high use facility registration program, which is required by Montgomery County law and to utilize equipment similar to or better than the criteria identified in the attachment identifying the batteries to be used at the site. Exhibit 43(a) is a fact sheet from Erickson Radio regarding base station cabinets. Exhibit 43(b) is a multi-page Northstar Battery material safety data sheet.



In Ms. Morrison's opinion, this support structure will be sited to minimize its visual impact while still satisfying all the environmental criteria. This pole and compound are designed for at least three carriers, including T-Mobile. 9/19/11 Tr. 76-78.

Ms. Morrison further testified that the only sign would be the required identification sign, and T-Mobile agrees to remove the structure if it's no longer in use for more than 12 months. 9/19/11 Tr. 79. T-Mobile agrees that it is responsible for maintaining the telecom facility in a safe condition, and there would be no outside storage except as specified on the plans. 9/19/11 Tr. 80. There will be an eight-foot high board-on-board fence that loops around the equipment, plus the landscaping around the compound, consisting of six to eight-foot high Leyland cypress and white pines. 9/19/11 Tr. 81-82.

Even after the trees lose their leaves in winter, Ms. Morrison believes visibility of the pole will still be very limited because of the density of the trees. 9/19/11 Tr. 85.

3. Oakleigh J. Thorne (9/19/11 Tr. 98-107):

Oakleigh J. Thorne, a certified general real estate appraiser in the State of Maryland and a member of the Appraisal Institute, testified as an expert in real estate appraisals. Mr. Thorne testified that multiple studies have indicated that the presence of a cell tower does not diminish property values of nearby residences and in some instances may increase their value. Moreover, a concealment pole such as the one proposed would have even less of an impact. 9/19/11 Tr. 100-105. Mr. Thorne concluded that there would be "absolutely no impact on property prices or values in the region" from the proposed monopole. 9/19/11 Tr. 103.

4. Curtis Jews (9/19/11 Tr. 107-128; 11/17/11 Tr. 10-38):

Curtis Jews testified as an expert in radio frequency (RF) engineering for T-Mobile. Mr. Jews is the RF lead engineer for T-Mobile for Maryland and the Washington, D.C. area. He worked on this site for T-Mobile. Mr. Jews testified that the subject site is needed for a cell tower in

the area because of “unreliable coverage . . . [T]here is a probability of the user not being able to carry a call or have any service at all, inside their home or inside their vehicle or if they are on the street.” 9/19/11 Tr. 110. He noted that the Tower Committee found that there was a need for this wireless facility.

Mr. Jews also introduced two coverage maps, Exhibit 24(m) showing current on-air coverage around the site and 24 (n), showing current on-air coverage with the proposed site, 7 WAN 251B, activated. Green is in-building coverage, which is the coverage that one can expect inside of the home. Blue is in-vehicle coverage, and the yellow is the on-street coverage.

At the subject site, 7 WAN-251, there is currently a lack of in-building coverage. Mr. Jews did not do a drive study in this case, but relied on modeling software. Exhibit 24(n), showing the expected coverage with 7 WAN-251 on air, there is an improvement in coverage. Where there was a lot of yellow, which is on-street coverage, and blue, which is in-vehicle, there now is in-building coverage, which is green, and more of the blue in-vehicle coverage. Thus, the new facility would fill in the gap and fulfill T-Mobile’s goal of providing in-building (green) coverage. 9/19/11 Tr. 111-114. This is needed because many people use cell phones now for their home phones and to provide internet coverage. The proposed facility will also increase capacity for data and more customers for T-Mobile. 9/19/11 Tr. 115.

Mr. Jews further testified that T-Mobile commits to complying with FCC rules and its license regarding emissions in that they will be within the required FCC emissions. He so indicated in a letter for the file. Exhibit 46. He also noted that the facility will not interfere with other public safety systems or other electronic devices in the area because it will operate on its own frequency band that is totally separate from other carriers. 9/19/11 Tr. 117-118.

At the November 17, 2011, hearing, Mr. Jews testified that T-Mobile needed to improve both its coverage and capacity in area of the subject site, and that it could lose its FCC license if it

did not provide adequate coverage. Mr. Jews adopted the statements in his affidavit (Exhibit 55(a)) and expanded upon them. 11/17/11 Tr. 10-38. Essentially, he testified that inadequate coverage or capacity results in dropped calls and the inability to initiate a call. Building the proposed wireless facility at 155 feet will aid in filling the existing coverage gaps and increasing the customer's confidence when using their devices within this area. A 155-foot height support structure satisfies the coverage objective for this area. In a concealment tower, such as proposed, the top antenna would be centered at 152 feet. In his opinion, for this type of design (*i.e.*, antennas inside the pole), a support structure height of 155 feet is the lowest possible height to meet T-Mobile needs. A support structure of less than 155 feet would provide too little coverage to meet the current and future needs of customers. As shown in the propagation maps (Exhibit 55(b)(3) and (b)(4)), there is a noticeable decrease in in-building coverage if the antenna height were reduced to 127 feet or 107 feet. 11/17/11 Tr. 10-38.

## **B. Community Witnesses**

### 1. Emory Barge (6/24/11 Tr. 34-53; 9/19/11 Tr. 13-30; 127-138):

Emory Barge testified that he lives at 21910 Whites Ferry Road, in Dickerson, on a 170-acre farm located .07 of a mile from the proposed tower. He discussed awards he had won and another cell tower case, but noted that the reason why he is opposed to this proposal is it would be in an agriculture preservation district. "Everything is supposed to be beautiful." 6/24/11 Tr. 37. He fears the tower will make the place "ugly," along with other additions to the area (the PEPCO plant, trenching in the sludge and the police firing range). He also feels there is no need for a new cell tower to improve service since he can already make calls on his cell phone. 6/24/11 Tr. 38-40.

A map (Exhibit 22) showing the Barge farm with an X was introduced. 6/24/11 Tr. 45-46. Mr. Barge was unable to identify the carrier which provides service to his "jitterbug" phone.

6/24/11 Tr. 48-50.

On the second hearing date, Mr. Barge introduced awards he had won for his efforts to preserve the environment, and he asserted that “Montgomery County has picked Dickerson and the dumping for everything in Montgomery County.” 9/19/11 Tr. 16-17. He gave as an example a 650 acre parcel that the County has reportedly purchased near his farm to use as a landfill.

Mr. Barge also stated that T-Mobile builds its facilities when the trees are out, but when the leaves fall, the tower is more visible. 9/19/11 Tr. 20-21. He complained that “T-Mobile has deep pockets” to support its application. 9/19/11 Tr. 24. Mr. Barge noted that his own phone is serviced by Verizon. 9/19/11 Tr. 25.

Mr. Barge asked a series of presumably rhetorical questions (9/19/11 Tr. 127-131):

1. Isn't the public entitled to know the number of cell towers presently under lease in Montgomery County, the terms of those leases and the locations of the sites?
2. Why does T-Mobile need so many towers?
3. Why do you need so many attorneys for setting up the cell phone agreements?
4. Why are T-Mobile lawyers establishing the cell towers as LLCs and what is their legal liability?
5. Why are these towers established and operated under T-Mobile instead of an LLC?
6. Please describe anything you are doing illegal or questionable?

2. Jon Anderson (9/19/11 Tr. 139-154):

Jon Anderson testified that he lives at 28710 Kemptown Road, Damascus, Maryland, about 24 miles from the subject site. Mr. Anderson stated that T-Mobile is trying to expand its business. He repeated some statistics from the Washington Post on September the 2nd, 2011, page A-12: AT&T has 98.6 million subscribers; Verizon has 106.3 million; Sprint has 52 million; and T-Mobile has 33.6 million. He accepts that they want to make more money, but he feels that it is “a crime that our horizons are covered with poles. I don't care whether they are Verizon or T-Mobile poles, or electric company poles.” 9/19/11 Tr. 139-142.

Mr. Anderson further testified that there is already good reception from other cell phone

carriers in the area, and he gets good reception on his Verizon powered phone around Poolesville, Dickerson and Damascus. He stated that he is not an environmentalist, but enjoys being able to see our world unobstructed. [The Hearing Examiner explained that it was not within his purview to make a policy decision as to whether or not cell towers are a good thing or a bad thing, but rather had to apply the statutory standards to evaluate this application.] 9/19/11 Tr. 143-144.

Mr. Anderson also questioned the fairness of the photograph taken from near Mr. Barge's farm because he felt the balloon should have been visible. He suggested that the photo was taken "down in the low area." Mr. Barge's house sits back about almost 150 yards, 200 yards from the highway, up on a high knoll. And from his house, a two-story house, he feels that Mr. Barge will be able to see the tower, once it's erected, especially when the leaves are off the trees. 9/19/11 Tr. 149-150.

Mr. Anderson also raised a concern about removal of the tower once it is no longer in use, and the Hearing Examiner noted that a condition is always imposed based on the statutory language requiring removal by the owner of the facility when it is no longer in use for more than 12 months. 9/19/11 Tr. 151-152.

#### **IV. FINDINGS AND CONCLUSIONS**

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioners have the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded that Petitioners will have satisfied all the requirements to obtain the special exception, if they comply with the recommended conditions

(Exhibit 33).

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Code §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioners comply with the conditions set forth in Part V, below.

### **A. Standard for Evaluation**

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a telecommunications facility. Characteristics of the proposed telecommunications facility that are consistent with the “necessarily associated” characteristics of telecommunications facilities will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with telecommunications facilities, or that are created by unusual site conditions, will be considered non-inherent effects. The



inherent and non-inherent effects thus identified must then be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff listed the following inherent physical and operational characteristics necessarily associated with a telecommunications facility use (Exhibit 33, 19):

- Antennas installed on or within a support structure with a significant height;
- A technical equipment area that may or may not be enclosed by a fence;
- Visual impacts associated with the height of the support structure;
- Radio frequency emissions; and
- A small number of monthly vehicular trips for maintenance.

In addition, Staff pointed out the following non-inherent characteristics of the site (Exhibit 33, p. 19):

- The location of the facility along a rustic road and a Maryland Scenic Byway;
- The location of the facility in the viewsheds of properties identified in the Master Plan for Historic Preservation and the Locational Atlas & Index of Historic Sites in Montgomery County Maryland; and
- The existence and location of prime farm soils on the property

The inherent effects of a typical monopole telecommunications facility would generally have only a visual impact on the neighborhood, since it would be noiseless, unmanned and require only occasional servicing. With the exception of the soil issue raised by Technical Staff, that is the case here.

The visual impact will be reduced in this instance because Petitioners have agreed to a number of steps to lessen the impact of both the inherent and non-inherent characteristics – the telecommunications facility will be set back far from Wasche Road (847 feet); it will be 678 feet from the nearest dwelling; the antennas will be concealed inside the pole; the pole will be painted gray to blend in; the site will be adequately buffered by trees (including off-site screening); and it will be surrounded by an eight-foot tall board-on-board fence to screen the lower part of the pole and the facilities within the compound.

The soil impacts will be ameliorated by a condition suggested Technical Staff, which has been recommended in Part V of this report. It would require the facility's owner to remove the 10-foot by 20-foot concrete platform and 50-foot by 50-foot gravel area, at the owner's expense, at the time that the pole is removed; restoration of the soils must also be done at the owner's expense in consultation with staff at the Montgomery Soil Conservation District.

With these mitigating steps, which are reflected in the plans of record and the recommended conditions, the Hearing Examiner concludes, as did the Technical Staff, that the inherent and non-inherent adverse effects from the proposed use would not warrant denial of the petition.

### **B. General Conditions**

The general standards for a special exception are found in Zoning Code §59-G-1.21(a). The Technical Staff report, the approval of the Transmission Facilities Coordinating Group, the exhibits in this case and the testimony at the hearing provide ample evidence that the general standards would be satisfied in this case.

#### **Sec. 59-G-1.21. General conditions.**

**§5-G-1.21(a)** *-A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

*(1) Is a permissible special exception in the zone.*

Conclusion: A telecommunications facility is a permissible special exception in the RDT Zone, pursuant to Code § 59-C-9.3(f).

*(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.58 for a telecommunications facility as outlined in Part C, below.

- (3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: Petitioners' property is located in the area subject to the 1980 Functional Master Plan for the Preservation of Agriculture (AROS Master Plan) and Rural Open Space and the 1996 Rustic Road Functional Master Plan (RRFMP). For the reasons set forth in Part II.D. of this report, the Hearing Examiner finds that the planned use is not inconsistent with the goals and objectives of the applicable Master Plans.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: The proposed installation will be in harmony with the character of the neighborhood because it will be minimally visible from the adjacent community due to the large setbacks and buffers and its construction as a concealment pole. There will also be no significant impact on traffic or parking. The proposed use is a low intensity use, only requiring on-site personnel for emergency repairs and regularly scheduled maintenance visits about once a month.

Based on these facts and the other evidence of record, the Hearing Examiner concludes, as did Technical Staff, that the proposed use will be in harmony with the general character of the neighborhood.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Technical Staff found the telecommunications facility will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood. The Hearing Examiner agrees for all the reasons stated immediately above, and those discussed in Part II.C. of this report, including the testimony of real estate appraiser, Oakleigh J. Thorne, to the effect that the presence of a cell tower does not diminish property values of nearby residences. 9/19/11 Tr. 100-105. Therefore, the Hearing Examiner finds that the telecommunications facility will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The tower will have no lights, and the equipment building will not be illuminated at night except when night-time servicing is required. Technical Staff found that the special exception would cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site. Exhibit 33, p. 22. Thus, the undisputed evidence supports the conclusion that the telecommunications

facility will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity, and the Hearing Examiner so finds.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: Technical Staff observed that this area is already burdened with “the Mirant power plant, the County’s Resource Recovery Facility (a waste-to-energy plant), the County’s Compost Facility, and vacant County property purchased for a future landfill (this use is no longer proposed, but the County retains ownership of the land).” Exhibit 33, p. 23. However, Staff also noted that the currently proposed use does not generate the truck and train traffic, or produce the noise, smoke, and odors associated with the other uses in this area, and therefore the type of impact would be different. Staff concluded that the impacts of the proposed use can be mitigated sufficiently by use of a concealment pole and extra screening. The Hearing Examiner agrees with Technical Staff that, with these mitigations, the proposed special exception use will not change the intensity of special exception uses sufficiently to affect the area adversely. Exhibit 33, p. 23.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site. Moreover, the federal Telecommunications



Act of 1996, 47 USC §332(c)(7)(B)(iv), provides that:

*No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications] Commission's regulations concerning such emissions.*

Petitioners' radio frequency (RF) expert, Curtis Jews, testified that if this site is approved, T-Mobile commits to complying with FCC rules and its license regarding radio frequency emissions. 9/19/11 Tr. 117-118. Petitioners will also be required to comply with all applicable hazmat regulations governing the site. The Hearing Examiner therefore concludes that the proposed telecommunications facility will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: The evidence supports the conclusion that the proposed special exception would be adequately served by the specified public services and facilities, to the extent they are needed for this type of use.

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*
- (B) *If the special exception:*
- (i) does not require approval of a new preliminary plan of subdivision; and*
  - (ii) the determination of adequate public facilities for the site is not currently valid for an impact that is the same as or greater than the special exception's impact;*
- then the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application. The Board of Appeals or the Hearing Examiner must consider whether the available*

*public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision. Therefore, the Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the applicable Growth Policy standards. These standards include Local Area Transportation Review (LATR) and Policy Area Mobility Review (PAMR). Technical Staff concluded that the proposed use would add no additional trips during the peak-hour weekday periods. Thus, the requirements of the LATR and PAMR are satisfied without a traffic study. By its nature, the site requires no school, water or sewer services. Technical Staff concluded, as does the Hearing Examiner, that the proposed facility will be adequately served by public facilities. Exhibit 33, p. 24.

(C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: Based on the evidence that this use will require no more than one vehicle visit per month (Exhibit 33, p. 26), the Hearing Examiner finds that the proposed use will not reduce the safety of vehicular or pedestrian traffic.

### **C. Specific Standards**

The testimony and the exhibits of record, as well as the Technical Staff Report (Exhibit 33) and the conclusion of the Transmission Facilities Coordinating Group (Exhibits 23 and 23(a)), provide sufficient evidence that the specific standards required by Section 59-G-2.58 are satisfied in this case, as described below.

***Sec. 59-G-2.58. Telecommunication facility***

*(a) Any telecommunication facility must satisfy the following standards:*

*(1) A support structure must be set back from the property line as follows:*

*A. In agricultural and residential zones, a distance of one foot from the property line for every foot of height of the support structure.*

*B. In commercial and industrial zones, a distance of one-half foot from property line for every foot of height of the support structure from a property line separating the subject site from commercial or industrial zoned properties, and one foot for every foot of height of the support structure from residential or agricultural zoned properties.*

*C. The setback from a property line is measured from the base of the support structure to the perimeter property line.*

*D. The Board of Appeals may reduce the setback requirement to not less than the building setback of the applicable zone if the applicant requests a reduction and evidence indicates that a support structure can be located on the property in a less visually obtrusive location after considering the height of the structure, topography, existing vegetation, adjoining and nearby residential properties, if any, and visibility from the street.*

**Conclusion:** Zoning Ordinance §59-G-2.58(a)(1)(A) requires, in a residential or agricultural zone, that the cell tower be set back a distance of one foot from the property line for every foot of height of the support structure. Given the total height of 155 feet for the cell tower, a 155-foot setback from each property line is required. This setback is easily met on all sides: it is 847 feet from the eastern (front) property line; 249 feet from the western (rear) property line; 198 feet from the northern (side) property line, and 195 feet from the southern (side) property line.

*(2) A support structure must be set back from any off-site dwelling as follows:*

*A. In agricultural and residential zones, a distance of 300 feet.*

*B. In all other zones, one foot for every foot in height.*

*C. The setback is measured from the base of the support structure to the base of the nearest off-site dwelling.*

*D. The Board of Appeals may reduce the setback requirement in the agricultural an[sic] residential zones to a distance of one foot from an off-site residential building for every foot of height of the support structure if the applicant requests a reduction and evidence indicates that a support*

*structure can be located in a less visually obtrusive location after considering the height of the structure, topography, existing vegetation, adjoining and nearby residential properties, and visibility from the street.*

Conclusion: The subject site is in an agricultural zone, so the 300-foot setback requirement applies. As shown in the Site Plan (Exhibit 38(a)), the closest off-site dwelling is 678 feet to the southeast, and it belongs to the co-Applicant. The distance was confirmed by Technical Staff. Exhibit 33, p. 28. Thus, the proposal is in compliance with this requirement.

(3) *The support structure and antenna must not exceed 155 feet in height, unless it can be demonstrated that additional height up to 199 feet is needed for service, collocation, or public safety communication purposes. At the completion of construction, before the support structure may be used to transmit any signal, and before the final inspection, pursuant to the building permit, the applicant must certify to the Department of Permitting Services that the height and location of the support structure is in conformance with the height and location of the support structure, as authorized in the building permit.*

Conclusion: The support structure will be 155 feet in height, and as shown in Exhibit 38(b), the top antenna will be centered internally at about the 152.5-foot level. The antenna will reach up to an internal height of approximately 155 feet, the top of the tower. Thus, the proposal meets the requirement of not exceeding 155 feet. A condition has been proposed in Part V of this report to ensure compliance with the certification requirement.

(4) *The support structure must be sited to minimize its visual impact. The Board may require the support structure to be less visually obtrusive by use of screening, coloring, stealth design, or other visual mitigation options, after considering the height of the structure, topography, existing vegetation and environmental features, and adjoining and nearby residential properties. The support structure and any related equipment buildings or cabinets must be surrounded by landscaping or other screening options that provide a screen of at least 6 feet in height.*

Conclusion: As discussed in Part II.C of this report, the proposal conforms to this requirement. In addition to the nearby trees, the compound will be surrounded by an 8-foot tall, board-on-board fence and screened by trees, both on site and off site.

(5) *The property owner must be an applicant for the special exception for each support structure. A modification of a telecommunications facility special exception is not required for a change to any use within the special exception area not directly related to the special exception grant. A support structure must be constructed to hold no less than 3 telecommunications carriers. The Board may approve a support structure holding less than 3 telecommunications carriers if:*

*(A) requested by the applicant and a determination is made that collocation at the site is not essential to the public interest; and*

*(B) the Board decides that construction of a lower support structure with fewer telecommunications carriers will promote community compatibility. The equipment compound must have sufficient area to accommodate equipment sheds or cabinets associated with the telecommunications facility for all the carriers.*

Conclusion: The property owner, John Ammerman, is a co-Petitioner. The facility will be capable of supporting three telecommunications carriers. Exhibit 33, p. 31.

(6) *No signs or illumination are permitted on the antennas or support structure unless required by the Federal Communications Commission, the Federal Aviation Administration, or the County.*

Conclusion: No signs or illumination are proposed, except the two-square-foot sign required by subsection (8), below, and a light on the equipment shelter to be used if emergency repairs are required at night.

(7) *Every freestanding support structure must be removed at the cost of the owner of the telecommunications facility when the telecommunications facility is no longer in use by any telecommunications carrier for more than 12 months.*

Conclusion: Petitioners' site plan (Exhibit 38(a), Note 22) calls for removal by Petitioners if the facility is not used for more than one year, and a condition to that effect is recommended in Part V of this report.



(8) *All support structures must be identified by a sign no larger than 2 square feet affixed to the support structure or any equipment building. The sign must identify the owner and the maintenance service provider of the support structure or any attached antenna and provide the telephone number of a person to contact regarding the structure. The sign must be updated and the Board of Appeals notified within 10 days of any change in ownership.*

Conclusion: The required sign will be installed (Exhibit 38(a), Note 24), and a condition so stating is recommended in Part V of this report.

(9) *Outdoor storage of equipment or other items is prohibited.*

Conclusion: No outdoor storage of equipment is proposed. Equipment will be enclosed as described elsewhere in this report.

(10) *Each owner of the telecommunications facility is responsible for maintaining the telecommunications facility, in a safe condition.*

Conclusion: Petitioners' site plan (Exhibit 38(a), Note 26) indicates that owner of the facility will maintain the facility in a safe condition, and a condition to this effect is recommended in Part V below.

(11) *The applicants for the special exception must file with the Board of Appeals a recommendation from the Transmission Facility Coordinating Group regarding the telecommunications facility. The recommendation must be no more than 90 days old, except that a recommendation issued within one year before June 22, 2010, must be accepted for one year from the date of issuance. The recommendation of the Transmission Facility Coordinating Group must be submitted to the Board at least 5 days before the date set for the public hearing.*

Conclusion: A recommendation of approval, dated March 3, 2011, was filed herein as Exhibit 7.

It was less than 90 days old when the petition was filed on March 29, 2011. It was supplemented on July 13, 2011, by a TFCG review of the changed location (Exhibit 23) and on September 30, 2011 by copies of previously missing notes from the Tower Coordinator's initial review (Exhibit 49(a)).

*(12) The Board must make a separate, independent finding as to need and location of the facility. The applicant must submit evidence sufficient to demonstrate the need for the proposed facility.*

Conclusion: As noted, both the Transmission Facility Coordinating Group and the Technical Staff recommended approval. The Hearing Examiner recommends that the Board make the finding that there is a need for the proposed telecommunications facility and that it will be appropriately located, based on the evidence set forth in Part II of this report.

*(b) Any telecommunications facility special exception application for which a public hearing was held before November 18, 2002 must be decided based on the standards in effect when the application was filed.*

Conclusion: Not applicable.

*(c) Any telecommunications facility constructed as of November 18, 2002 may continue as a conforming use.*

Conclusion: Not applicable.

#### **D. Additional Applicable Standards**

##### **Section 59-G-1.23. General development standards.**

*(a) Development Standards. Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

Conclusion: This petition falls under the exception because Zoning Ordinance §59-G-2.58 specifies the development standards for telecommunications facilities. As discussed above, the proposed use meets those standards.

*(b) Parking requirements. Special exceptions are subject to all relevant requirements of Article 59-E.*

Conclusion: Technical Staff did not recommend any parking for the proposed facility because it will ordinarily require no more than one service visit per month.

(c) *Minimum frontage. In the following special exceptions the Board may waive the requirement for a minimum frontage at the street line if the Board finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21:*

\* \* \*

(5) *Public utility buildings and public utility structures, including radio and T.V. broadcasting stations and telecommunication facilities.*

Conclusion: No waiver is needed because the subject site is located on a large property, which has more than adequate frontage. In any event, the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of Section 59-G-1.21.

(d) *Forest conservation. If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Conclusion: According Technical Staff, the property is exempt from submitting a forest conservation plan (Exhibit 6).

(e) *Water quality plan. If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: This section pertains only to sites in special protection areas, where water quality plans are required. This site is not within an SPA.

(f) *Signs. The display of a sign must comply with Article 59-F.*

Conclusion: As indicated earlier in this report, the only sign on the facility will be the two-square-foot sign required by the special exception.

(g) *Building compatibility in residential zones. Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.*

Conclusion: Inapplicable. The subject site is in an agricultural zone, not a residential zone.

(h) *Lighting in residential zones. All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:*

(1) *Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*

(2) *Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: Inapplicable. The subject site is in an agricultural zone, not a residential zone.

Based on the testimony and evidence of record, I conclude that the telecommunications facility use proposed by Petitioners, as conditioned below, meets the specific and general requirements for the special exception, and that the Petition should be granted, subject to the conditions set forth in Part V of this report.

## **V. RECOMMENDATION**

Based on the foregoing analysis, I recommend that Petition No. S-2805 for a special exception to construct and operate a telecommunications facility, including a 155-foot tall “concealment” monopole, and related equipment, at 19100 Wasche Road, Dickerson, Maryland, be GRANTED, with the following conditions:

1. The Petitioners shall be bound by all of the exhibits of record, and by the testimony of their witnesses and the representations of counsel identified in this report.

2. At the completion of construction, before the support structure may be used to transmit any signal, and before the final inspection pursuant to the building permit, the Petitioners must certify to the Department of Permitting Services that the height and location of the support structure is in conformance with the height and location of the support structure as authorized in the building permit.
3. The Petitioners shall plant additional screening trees off-site between the Ammerman residential property (Parcel P479) and the Yates property (Parcel P595), as agreed to by Petitioners in the manner described in their submission labeled Exhibit 58(a).
4. The telecommunication facility must display a contact information sign, no larger than two square feet, affixed to the outside of the equipment enclosure. This sign must identify the owner and the maintenance service provider and provide the telephone number of a person to contact regarding the installation. The sign must be updated and the Board of Appeals notified within 10 days of any change in ownership.
5. There must be no antenna lights or stroboscopic lights unless required by the Federal Communications Commission, the Federal Aviation Administration, or the County.
6. There must be no outdoor storage of equipment, except equipment specified in the Site Plan.
7. Each owner of the telecommunications facility is responsible for maintaining the facility in a safe condition.
8. The facility shall be available for co-location of up to three carriers.
9. The telecommunications facility must be removed at the cost of the owner of the telecommunications facility when the facility is no longer in use by any telecommunications carrier for more than 12 months. In addition, the 10-foot by 20-foot concrete platform and 50-foot by 50-foot gravel area must be removed by the facility owner at the owner's expense, at



the time that the pole is removed; restoration of the soils must be done at the owner's expense in consultation with staff at the Montgomery Soil Conservation District.

10. Petitioners must obtain a Hazmat Use Permit for the subject site before commencing operations.
11. Petitioners must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioners shall at all times ensure that the special exception use and the entire premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: December 2, 2011

Respectfully submitted,



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Martin L. Grossman  
Hearing Examiner